Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, ET AL.,
Petitioners,

v.

MARK A. MACARRO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 18, 2010

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Writ of Habeas Corpus under the Indian Civil Rights Act limited solely to tribal criminal proceedings instead of also including tribal civil proceedings which result in the disenrollment of life-long tribal citizens?

2. Does the combination of "disenrollment," which is the stripping away of Appellants' life-long tribal citizenship and the current and potential restrictions placed on Appellants, constitute a severe restraint on their liberty so as to satisfy the "detention" requirement of Section 1303 of the Indian Civil Rights Act?

3. Does the disenrollment of life-long tribal members, by itself, constitute a severe restraint of liberty so as to satisfy the "detention" requirement of the Indian Civil Rights Act?

4. Did the Appellants exhaust their tribal remedies by going through every Pechanga Tribal appeal proceeding available to contest their disenrollment?

LIST OF PARTIES

The parties are as follows:

LOUISE VICTORIA JEFFREDO; JOYCE JEAN JEFFREDO-RYDER; CHRISTOPHER L. RYDER; JEREMIAH S. RYDER; JONATHAN B. RYDER; MICHAEL JOHN JEFFREDO; ELIZABETH VILLINA JEFFREDO; JACKIE M. MADARIAGA; KELLY M. MADARIAGA; CARRIE MADARIAGA; LAWRENCE MADARIAGA; WILLIAM A. HARRIS; STERLING HARRIS; APRIL HARRIS; MINDY PHENEGER; RICHARD HARRIS, *Petitioners-Appellants.*

-v-

MARK A. MACARRO; DONNA BARRON; MARC CALAC; MARK LUKER; ANDREW MASIEL; RUSSELL BUTCH MURPHY; KENNETH PEREZ; DARLENE AZZARELLI; CHRISTINE LUKER, *Respondents-Appellees.*

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Louise Victoria Jeffredo, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-captioned case on December 22, 2009.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, entitled Louise Victoria Jeffredo, et al. *-v-* Mark A. Macarro, et al., can be found at No. 08-55037 D.C. No. CV-07-01851-JFW. A copy of the opinion is included in the appendix attached to this petition as Appendix A. The district court entered its final order on December 4, 2007 by granting Respondents' Motion to Dismiss with prejudice for lack of jurisdiction under the Indian Civil Rights Act (25 USC §1301-1303). A copy of the opinion is included in the appendix attached to this petition as Appendix B.

JURISDICTIONAL STATEMENT

On December 22, 2009 a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit issued a published opinion affirming the District Court's decision that jurisdiction does not exist under the Habeas Corpus provision of the Indian Civil Rights Act of 1968 (25 U.S.C. §1303) for forfeiture of American Indian tribal citizenship and the subsequent physical restraints. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

This petition for Certiorari is being timely filed by mailing on March 17, 2010 This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. §1254(1). The Solicitor General is being served a copy of this petition by mail on the same date it is being sent to the Court.

STATUTES, GUIDELINES, AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 8:

> The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes; ...

Title 25, United States Code, § 1301-1303, Indian Civil Rights Act §1303. Habeas corpus

> The privilege of the writ of **habeas corpus** shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Title 18, United States Code §1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The Respondent's tribe, one of the wealthiest Casino-based tribes in the United States, has kicked

out approximately 25% of its members in the last six years. In 2006, the Pechanga Tribe's six member Enrollment Committee, appointed by abusive tribal officials, disenrolled 100 adults and 100 children. They stripped these life-long members of their tribal citizenship in violation of the due process guarantees of the Indian Civil Rights Act.

The only U.S. Supreme Court case interpreting the Act is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) which held that habeas corpus was the only remedy available for ICRA violations. Consequently, appellants (16 of the life-long members disenrolled in 2006)[1] exhausted their available tribal remedies and filed a petition for a writ of habeas corpus in district court pursuant to the Indian Civil Rights Act. This Act was passed in 1968 after Congressional hearings exposed the abuses that many tribal members were

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[1] In the present case each member of the Tribe receives a per capita of at least $250,000 a year and other monetary benefits. Since the disenrollment of 100 adult members of the Appellants' Hunter Family four years ago, the remaining members have been enriched by approximately one hundred million dollars. As the approximately 100 disenrolled children come of age, the increase of monies to the remaining tribal members becomes even more astounding.

The Pechanga Tribe is the second highest donor to political coffers in the entire State of California. (San Francisco Chronicle, "State's Gaming tribes are top campaign donors." Nov. 29, 2009 at 1). Indian gambling is a 7.7 billion dollar business in California. (San Francisco Chronicle, "Tribes Toss Out Members in High-Stakes Conflict," April 20, 2008 at 1). (Available at www.sfgate.com). See also: Lucas, Greg, "Senate Approves Boost in Indian Slot Machines," San Francisco Chronicle, April 20, 2007, at B4, *available at* www.sfgate.com (in archives), and Yu, Belinda, "Coins in the Legislative Machine," Stanford Daily, February 2, 2007, *available at* www.stanforddaily.com (search title).

enduring at the hands of occasionally corrupt, incompetent, or tyrannical tribal officials.[2]

The effect of the Act was to impose upon Indian tribal governments, most of the same kind of restrictions against abridging the civil rights of its citizens that are applicable to federal and state governments. The legislative history of ICRA reflects a Congressional intent to protect the individual rights of Indians, while at the same time also fostering tribal self-government and cultural identity, thus the statue has twin, and seemingly conflicting goals. The High Court here is asked to find the balance between ICRA's individual's protections, including tribal voting rights, versus an unbridled acceptance of tribal autonomy, regardless of the potential transgressions of tribal governments.

To understand this case one must distinguish "banishment" from "disenrollment." In the instant case the Petitioners were disenrolled but not formally banished. Banishment is the temporary or permanent physical exclusion from tribal grounds. With banishment, one still retains his/her tribal citizenship and benefits. Disenrollment is more extreme for it strips away forever, one's tribal citizenship; takes away all related benefits and sets up the disenrollee for future banishment without the protections enjoyed by other tribal members.

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[2] [ICRA Legis. History S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). See also 1968 U.S. Code Cong. & Admin News, pp. 1837, 1863-1867.) ICRA, also known as the Indian Bill of Rights, was enacted by Congress in language taken from the United States Constitution. (82 Stat. 77, 25 U.S.C. 1302, 1303).

To grasp the impact of disenrollment let us briefly look at what happened to tribal elder and Appellant Lawrence Madariaga. This 92 year-old life-long member of the Pechanga Tribe is an important Pechangan, as he personally designed and built the Health Center. He brought a water system to the Reservation and in 2005 he was praised for his life-long tribal work. There is even a road on the Reservation named for his ancestor, Paulina Hunter, an original U.S. government allottee of the Pechanga Reservation. But now he can no longer use the Health Clinic that he built, or enjoy the Pechanga Senior Citizen Center. His grandchildren and great-grandchildren cannot attend the tribal pre-school and elementary school where the language, culture and history of the Tribe are taught. When Sophia, his wife of over 70 years died, they were denied the use of Reservation facilities for her memorial and sadly, she was denied burial with her ancestors on the Reservation.

When the Hunter family's lineage was questioned, the (Tribe) Enrollment Committee hired noted California anthropologist, Dr. John Johnson, to investigate. His investigation concluded that, "There is no one today that has more of a right to be a Pechanga Indian than that family (the Hunter Family)."[3] Dr. Johnson's report was rejected; the Tribe then fired him and soon thereafter disenrolled almost 200 descendants of Paulina Hunter.

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[3] KNBC 2007 news report entitled "Pechanga Membership Battle," http://www.nbclosangeles.com/news/Pechanga_Membership_Battle_Los_Angeles.html. Also see Dr. Johnson's letter to Tribe after disenrollment of Paulina Hunter's clan, dated June 20, 2006 attached as Appendix C.

The district court ruled for Respondents on jurisdictional grounds. The Ninth Circuit, in a 2-1 opinion, upheld the lower court and added a new failure-to-exhaust tribal remedies ruling. The court also, on a crucial issue of "first impression," restricted ICRA solely to tribal criminal proceedings, even though almost all disenrollments are done by civil proceedings.

Judge Wilken's articulate and persuasive dissent serves as a template for the reasons for the High Court to grant review.

REASONS FOR GRANTING THE WRIT

1. Restricting Federal Jurisdiction Under The Indian Civil Rights Act Solely To Tribal Criminal Proceedings Destroys The Guarantees Of The Act By Allowing Abusive Tribal Governments To Strip Away The Citizenship Of Life-Long Tribal Members Without Any Due Process Protections.

2. The Court's Restrictive Interpretation Of The ICRA Allows Abusive Tribal Officials *Carte Blanche* To Stamp Out Any Dissent To Their Policies, To Drastically Reduce The Tribal Electorate And To Increase The Share Of Casino Profits To Themselves And Their Families And Friends.

3. Disenrollment Is The Harshest Penalty A Tribal Member Can Suffer As It Is Analogous To Denationalization And Is A Severe Restraint On One's Individual Liberty As A Citizen Of The Tribe.

4. The Lower Court's Interpretation Of The Exhaustion Of Internal Remedies Requirement Is

So Extreme That No Native American Who Is Disenrolled (But Not Banished) From Their Tribe Could Contest That Loss Of Tribal Citizenship And Its Restrictions In Any State Or Federal Court.

1. Restricting Federal Jurisdiction Under The Indian Civil Rights Act (ICRA) Solely To Tribal Criminal Proceedings Destroys The Guarantees Of The Act By Allowing Abusive Tribal Governments To Strip Away The Citizenship Of Life-Long Tribal Members Without Any Due Process Protections.

The Appellate Court correctly described the question of whether there is habeas relief under 25 U.S.C. §1303 of the Indian Civil Rights Act ("ICRA") in a non criminal context as a "an issue of first impression for the court." (Majority at 16a, headnote 12). Unfortunately the majority also makes the protections of ICRA virtually meaningless by ruling that habeas relief may not be granted from any tribal civil proceeding. (Majority at 16a)

Terrible consequences flow in the real world from this restrictive ruling. In California approximately 5,000 tribal members have been disenrolled in the last few years.[4] The vast majority of California tribes do not have tribal courts. Therefore, they will continue to disenroll members without due process in General Council meetings like in *Quair I*[5] or through enrollment committees appointed by abusive tribal officials like the Tribe did here. In both situations tribal officials will be immune from the guarantees of ICRA and tribal members will be locked out of any judicial review. This is a tragic result.

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[4] Fagan, Kevin, "Tribes Toss Out Members in High Stakes Quarrel," San Francisco Chronicle, April 20, 2008, available at *www.SFGate.com* (search "disenrollment" in full archive).

[5] *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004)

The other tragic consequences of the majority's mistaken interpretations of habeas law will take place nationally. Large tribes who have tribal courts will be advised by their lawyers to circumvent their court structure and disenroll members in "civil proceedings." This legal maneuver will deny their disenrolled citizens any judicial means of reviewing the lack of due process.

On the face of §1303 the *only* requirement to invoking habeas review is a "detention." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 886, 887 (2d Cir. 1996).[6] Section 1303 simply provides, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." The majority's decision to restrict §1303 to criminal proceedings is not supported by the legislative history of the Act, the limited case law that has interpreted the provision, or even the history of the writ of habeas corpus.

a. The Court Must Examine Traditional Habeas Law In Determining The Scope Of §1303 Because Legislative History Of ICRA Is Not Conclusive.

The legislative history of ICRA does not conclude that Congress intended habeas review to be restricted solely to criminal convictions or whether other

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[6] The court in *Poodry* held that disenrolled and banished members of an Indian Tribe accused of treason, could invoke habeas corpus under §1303 because they demonstrated a sufficiently severe restraint on liberty to be "in custody" for purposes of habeas jurisdiction. *Id.*

circumstances of "detention" by a tribal court order can trigger habeas review. *See Poodry, supra* at 888. The majority's lack of analysis of ICRA's legislative history demonstrates the court's inability to find legislative support for their holding. In determining the scope of §1303, courts have in the past consistently looked to the development of the federal writ of habeas corpus (28 U.S.C. 2254) for guidance.[7] The court in *Poodry* stated, "We conclude that we must conduct the **same inquiry** under §1303 as required by other habeas statutes, but we find that...§1303 supplies a jurisdictional basis for federal court review of the tribal government action alleged in this case." *Poodry, supra* at 890. (emphasis added). Further, the court states that Congress did not "in adopting §1303, intend to create jurisdictional requirements different from those associated with traditional habeas remedies." (*Id.* at 893). There appears no reason in the plain language of §1303 to give it a more restrictive "reach than [the] cognate statutory provisions governing collateral review of state and federal action[s]." *Id.* at 879-80, dissent at 22a. Thus, in determining the scope of §1303, a reviewing court *must* examine traditional habeas corpus remedies.

The majority opinion in this case recognizes the necessity for examining traditional habeas law, but also contradicts itself by later refusing to look at other habeas precedent on this issue of inclusion of civil proceedings. The court states "The term 'detention' in

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[7] "This court has consistently found the law which has developed with respect to actions for habeas corpus relief under 28 U.S.C. §2254 to be applicable by analogy to actions founded upon 25 U.S.C. § 1303." *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F. Supp. 294, 296 (D.Mont. 1985) at fn.2.

§1303 must be interpreted similarly to the 'in custody' requirement in ***other habeas contexts***." *See Moore v. Nelson,* 270 F.3d 789, 791 (9th Cir. 2001), majority at 9a, hn [1] (emphasis added). However, the court later contradicts itself by rejecting the dissent's argument which points to *Duncun v. Walker,* 533 U.S. 167, 176 (2001) as persuasive on interpretation of §1303. The dissent stated that,

> "The Supreme Court has held more recently that nothing in the language of the provisions for federal habeas relief for a person in custody pursuant to the judgment of a state court 'requires that the state court judgment pursuant to which a person is in custody to be a criminal conviction."

Dissent at 22a, citing *Duncun v. Walker,* 533 U.S. at 176. The majority inexplicably rejects this argument stating, "We do not find that this precedent bears on whether ICRA habeas petitions are available in civil proceedings." Majority at 17a fn. 2. The majority's holding simply cannot be supported if relevant and established habeas law is examined.

b. The History Of Habeas Corpus Includes Civil Proceedings

The writ of habeas corpus has traditionally been available to challenge detentions resulting from civil or criminal proceedings.

> "Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under

> arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*."

Wales v. Whitney, 114 U.S. 564, 571 (1885). The essence of the Writ is to protect individuals against erosion of their right to be free from wrongful restraints upon their liberty and the remedy has evolved through time to meet this objective.[8] Thus, the central inquiry of a court determining habeas jurisdiction has historically been into the *severity* of the restraint suffered by the Petitioner[9] and not the mere label on the proceeding. Courts have heard cases challenging civil commitment to a mental institution and challenges to civil contempt orders for failure to pay child support, in the form of habeas corpus actions.[10] The underlying state court judgments in these cases were not criminal convictions.

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[8] "It [the Great Writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236 (1963).

[9] *Id.* at 238-239.

[10] *Francois v. Henderson*, 850 F.2d 231 (CA5 1988) (entertaining a challenge brought in a federal habeas petition under §2254 to a state court's commitment of a person to a mental institution upon a verdict of not guilty by reason of insanity); *Leonard v. Hammond*, 804 F.2d 838 (CA4 1986) (holding that constitutional challenges to civil contempt orders for failure to pay child support were cognizable only in a habeas corpus action).

The majority wrongly rejects Judge Wilken's persuasive analysis regarding the historical context of habeas corpus pointing to inclusion of civil proceedings. See dissent at page 21a-22a and majority at 17a. This history shows that habeas application to civil proceedings is not an "extension" of habeas corpus but rather well within the scope of habeas absent clear legislative intent and accompanying language to the contrary. Thus, the majority's statement that habeas relief should not be "extended" to civil proceedings is a misstatement of the nature and history of habeas corpus law.

It appears that the majority simply refuses to recognize the application of this history as specifically relevant to the interpretation ICRA. This oversight is a dangerous one if left standing, as it threatens the way courts construe statutory provisions of habeas in other contexts. Presently the law respecting the Writ is largely statutory and the legislature normally determines the proper scope of the Writ. If the legislature wishes to limit a courts' habeas jurisdiction however, the repeal must not violate the Suspension Clause, and it must be made in clear and unambiguous language.[11] In the instant case, the Appeals court has overstepped its powers in restricting habeas jurisdiction by effectively repealing habeas from tribal civil proceedings absent *any* clear and unambiguous language from Congress.

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[11] *Chmakov v. Blackman*, 266 F.3d 210, 214-215 (3d Cir. 2001).

c. Restricting §1303 Destroys The Purpose And Proper Application Of The Provision.

In restricting habeas to "criminal proceedings" the court not only fails to recognize the essence of habeas but it also fails to recognize the complex and diverse tribal decision making entities to which ICRA must necessarily be applied. In the current case, the Pechanga tribe has no criminal code and no tribal court. Therefore, it could be said that every action that the tribe takes could be construed to be civil no matter how severe or punitive the result. Thus, the majority has rendered ICRA effectively unenforceable by Petitioners and for many other Indians nationally.

d. The Supreme Court Decision In *Santa Clara Pueblo* Is Not Binding On This Case.

Citing support for their finding that ICRA only applies to criminal proceedings, the court cites three cases, *Alire*,[12] *Quair I*[13] and *Santa Clara Pueblo v.*

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[12] *Alire v. Jackson*, 65 F. Supp. 2d 1124 (D. Ore. 1999). This case dealt with a nonresident, nonmember of a tribe seeking to use §1303. *Alire* is distinguishable because case law is clear that non-members do not have the same rights as tribal members and therefore cannot establish a detention under §1303. See *Quechan Tribe of Indians v. Rowe*, 532 F.2d 408, 410 (9th Cir. 1976); *Liska v. Macarro et.al.*, No. 08-CV-1872IEG(POR), 2009 WL 2424293 (S.D. Cal. Aug. 5, 2009).

[13] The court drastically misinterprets *Quair*, 359 F. Supp. 2d 948 "Quair I", both factually and legally. Factually there were no criminal charges. The basis of the disenrollment was that the Petitioners went to a lawyer outside the tribe for advice. Petitioners were then disenrolled in a civil proceeding (a General Council meeting of the Tribe). And legally, the district court ruled

Martinez, 436 U.S. 49 (1978). However, these cases cannot be read to hold that ICRA applies to only civil proceedings as they differ factually and legally from the present case. The court in *Quair I* addresses the inapplicability of *Santa Clara Pueblo* stating, "Santa Clara Pueblo simply does not compel the conclusion that all membership determinations are 'civil in nature' and therefore insulated from federal habeas review." (*Id.* at 965). Yet, the court cites these cases as the basis for restricting §1303.

Santa Clara Pueblo was a case involving declaratory and injunctive relief. Congress had not provided for such relief in ICRA, and consequently the Supreme Court's ruling only bars those types of claims. *Santa Clara Pueblo, supra* at 58-59. The court in *Poodry* clearly states that "*Santa Clara Pueblo* obviously does not speak directly to the scope of Title I's habeas provision, which was not a matter raised in that case." *Poodry*, 85 F.3d at 887. The dissent below said that *Santa Clara,* "does not preclude habeas review of civil proceedings that result in detention." Dissent at 23a. Furthermore, the facts of *Santa Clara Pueblo* are qualitatively different than those of the instant case. *Santa Clara Pueblo* involved Indian children who could not be enrolled into the Tribe because their father was a non-tribal member. The Tribe's enrollment criteria allowed a man who married outside the tribe to enroll his children, but it did not

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that regardless of the nature of the proceedings (civil or criminal) it was the consequences of the tribe's decision that determined jurisdiction under ICRA. The court granted federal habeas jurisdiction. *Quair II* (*Quair v. Sisco*, No. 1:02-cv-5891 DFL, 2007 WL 1490571 (E.D. Cal. May 21, 2007)), also cited, can be read to support the majority's position.

allow a woman who married outside the tribe to enroll hers. Thus, an action was brought on the grounds that the enrollment requirements discriminated against women of the tribe. The relief sought was for *non-members* of the tribe who were attempting to change a clearly defined and longstanding membership criteria of the Santa Clara Pueblo in order to judicially force the Tribe to enroll them.

In this case, all the Appellants were already *members* in good standing, all had been recognized as Pechanga Indians for many years until the enrollment committee illegally changed the membership criteria and selectively applied that new criteria to Appellants. The Court in *Santa Clara* was not called upon, and did not consider Congress' limitations on tribal powers pursuant to an ICRA petition for a writ of habeas corpus.

The majority below states it is valuing tribal sovereignty, however in making such a sweeping restriction of ICRA the court takes away a vital remedy provided to Native Americans by Congress in passing ICRA. By restricting habeas relief, the court below has rewritten the law of the Great Writ.

2. The Court's Restrictive Interpretation Of ICRA Allows Abusive Tribal Officials Carte Blanche To Stamp Out Any Dissent To Their Policies, To Drastically Reduce The Tribal Electorate And To Increase The Share Of Casino Profits To Themselves And Their Families And Friends.

Section 1303 of ICRA has one requirement for jurisdiction – a "detention." The U.S. Supreme Court

is clear that a non-custodial detention can be the basis for habeas jurisdiction. See e.g. *Jones v. Cunningham*, *supra* at 239-40. A requirement that a person is no longer free to "come and go" as they did previously satisfies jurisdiction. See *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Even a requirement to attend fourteen hours of alcohol rehabilitation constituted custody. See *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) *cert. denied*, 510 U.S. 1110 (1994).

The test of detention is whether the restraint is a "severe" actual or potential limitation on liberty. See, *Hensley* 411 U.S. at 351-52. *Poodry*, 85 F.3d at 894-95. Appellants suffer numerous severe restraints. One, they have been stripped of their citizenship rights (described fully in Section 3). Two, they cannot go to the Senior Citizens Center, the Health Clinic, the Tribal school, and other places on the Reservation that are available only to members. Three, because they are now "non-members" of the Tribe they can be instantly excluded from the Reservation for seven days. This action can be taken by the Tribal Rangers on their own authority. "This is a severe restraint to which members of the Pechanga Band are not generally subject." Dissent at 27a, citing the freedom to "come and go" test of *Hensley*, *supra*. Fourth, Appellants are no longer members of the Tribe and having brought this case are viewed with antagonism by the tribal officials. Appellant Michael Jeffredo and others have already been harassed by Tribal Rangers. (Declaration of Michael Jeffredo) (ER. Tab 17, Docket no. 31, Bates 099-100). If any Appellant is excluded for seven days by a Ranger, the Tribal Council can make this exclusion permanent *without* the consent of

the Tribe (Non-member Ordinance, Article 4 (f) (ER. Tab 22, Docket no. 27, Bates 139, Article 11(c)).

Appellants, viewed as a hostile political force, and representing approximately 100 Hunter family adults and former tribal voters, are under a potential threat of exclusion/banishment

> "(t)he threat makes the punishment obnoxious...it subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated."

Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

The majority analyzed each restraint separately and found that none amounted to a detention. But the correct test is used by the dissent which analyzed the restraints collectively. See dissent at 25a. Appellants have been stripped of their citizenship; are restricted to where they can go to on the Reservation; they face potential physical restraints and discrimination and are under a constant potential threat of banishment. The combination of these factors satisfy the detention requirement of ICRA and should allow federal court jurisdiction in this case.

3. Disenrollment Is The Harshest Penalty A Tribal Member Can Suffer As It Is Analogous To Denationalization And Is A Severe Restraint On One's Individual Liberty As A Citizen Of The Tribe.

Loss of citizenship is a sweeping and severe deprivation of one's rights. In an instant, the person changes from a protected national citizen, to a resident alien. Once citizenship is gone, the individual loses all of the rights and privileges that the other citizens of that country enjoy. One cannot devise a more personally devastating event than to take away one's nationality, to erase one's place in their own ethnic group. In her dissent, Judge Wilken quoted *Trop v. Dulles*, 356 U.S. 86,

> "To take away a man's citizenship deprives him of a right no less precious than life or liberty (itself)... It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development...". Dissent at page 28a.

Petitioner, Lawrence Madariaga's 90 plus years as a Pechangan citizen has been extinguished, yet he has committed no crime. The High Court has stated that losing citizenship brings the "total destruction of individual's status in organized society." *Trop*, 356 U.S. 86, 101. Here, the Hunter Family's standing in their community and within their original homeland of over 10,000 years has been trampled. "Our roots sunk deep into the land. The ashes of our ancestors cover

the place where the sun is."[14] Lawrence will never participate in sacred Pechanga ceremonies or be amongst the respected Tribal elders again. He will never again hold tribal office or even vote in a Pechangan election. That right has been lost forever to Lawrence and his whole family, whose voting influence has been diluted to the point of non-existence within their own tribe of people. (See Voting Rights Act, 42 U.S.C. §1973; *Voinovich v. Quilter*, 507 U.S. 146 (1993) where it was held illegal to dilute a minority's voting influence.)

a. The United States Government Cannot Take Away Citizenship From A Natural-Born Citizen And The Pechangan Government Should Not Be Permitted To Take Away The Citizenship Of Natural-Born Pechanga Citizens.

There is an ocean of difference between the denial of an individual application for citizenship as in *Santa Clara*, 436 U.S. 49 (1978), and stripping of it from a natural-born citizen who has enjoyed it for life and even for generations before that, as occurred in this case. The Pechanga Tribal government took away Appellants' citizenship and claimed that they were never rightful citizens in the first place. The result is a punishing blow to the entire Hunter clan, especially when the sentence is without factual grounds or legal foundation. A central purpose of ICRA was to " 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary

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[14] from Pechanga Website: www.pechanga-nsn.gov/ see History

and unjust actions of tribal governments.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978); Legis. History S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). The current trend of the Courts is to accord as much Tribal sovereignty as possible which is a compassionate realization of the modern world, but such deference itself, will not rein in the excesses of errant Tribal governments. That is why the ICRA and its protections were created in the first place.

The forfeiture of citizenship was considered so extreme, so severe that it has been banned as a cruel and unusual punishment by the High Court. "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress." Dissent at 28a-29a, quoting *Poodry*, 85 F.3d at 896.

The Supreme Court elucidated in *Trop* what many of us take for granted, that our American citizenship is inviolate. But it was not until 1958 that the High Court declared that *denationalization* of a natural-born citizen (compared to the *denaturalization* of an immigrant) under any circumstances is so severe a penalty that it is beyond the federal government's exercise of power, and thus is invalid if attempted. In confirming the strength of United States citizenship, Justice Earl Warren ruled that, citizenship is not subject to the general powers of the national government and therefore cannot be divested in the exercise of those powers". It is also so dear to us as Americans, that the "use of denationalization as a punishment is barred by the Eighth Amendment." *Trop*, 356 U.S. 86, 101. [HIn15]

The Supreme Court has stated that when one gives up their citizenship, it must be a clear and unequivocal denunciation, made voluntarily, even when they have committed horrendous acts

> "The deprivation of (natural-born) citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship...I believe his fundamental right of citizenship is secure."

Trop, supra, 356 U.S. at 92-93.

Although not couched as a punishment but as a correction of the rolls, and accomplished in a civil setting, the effects on Lawrence Madariaga's clan is devastating nonetheless, causing them to live like virtual outcasts in their own land. All of this was accomplished in demoralizing proceedings that appeared to have a simple administrative purpose and effect. Appellants, all natural-born citizens of Pechanga, have not voluntarily relinquished their status as citizens and continue to seek federal protection of their Pechanga citizenship. *Poodry* exalted the importance of Indian Tribal citizenship and the severe price that is paid when it is taken away,

> "(w)e deal here not with a modest fine or a short suspension of a privilege found not to satisfy the custody requirements for habeas relief but with the coerced and peremptory deprivation of the

> petitioners' membership in the tribe and their social and cultural affiliation."

Poodry, 85 F.3d 874, 895.

Poodry also articulated the likeness between American Indian tribal membership and United States citizenship. Of course, Indians were citizens of their own tribe long before they were formally granted US citizenship by an Act of Congress in 1924 (43 Stat. 253; 8 U. S. C. §1401 (b). The *Poodry* court quoted a cogent statement from *Klapprot* concerning the grave and punitive nature of taking away national citizenship: "the Supreme Court has long recognized that a deprivation of citizenship is 'an extraordinarily severe penalty' with consequences that 'may be more grave than consequences that flow from conviction for crimes.'", *Klapprot v. United States*, 335 U.S. 601, 611-12 (1949) *Poodry*, *supra* at 896-897 Dissent at 28a. Lawrence Madariaga has committed no crime, yet he has been summarily disenrolled without any real due process to aid him.

b. Due Process Was Not Provided At Petitioners' Disenrollment Hearings.

The Tribe's characterization of the Hunters' disenrollments as a simple correction of the rolls, made in a civil setting with due process guarantees was in reality, like a *kangaroo court*, where the final outcome precedes the trial. The due process provided by the Tribe did not include the right to a lawyer at the disenrollment hearings; it did not include the right to confront adverse Tribal witnesses and the burden of proof was placed on Petitioners, not on a tribal prosecutor. The Enrollment Committee established no

standard of proof for their disenrollments and the Tribe did not give advance notice of the charges, namely, the basis upon which the Hunter clan did not meet the tribal requirements for membership. Without knowing the allegations against them beforehand, the Hunters had no way to refute any of the so-called charges.[15] It wasn't until they received the Tribe's *Record of Decision* that they discovered the so-called reason they were disenrolled.[16]

The results have proven extremely punitive although the hearings were 'civil' in nature. "But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable." *Trop*, 356 U.S. 86, 93. But, regardless of the label: civil or criminal; regardless of the reason: treason or correcting the rolls; the loss of life-long tribal citizenship is the ultimate punishment and the ultimate destroyer of a person's identity and their national standing.

Labels are certainly not a substitute for analysis, as Justice Warren said in *Trop*, "How simple would be the tasks of constitutional adjudication and of law

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[15] Nonetheless, the Hunters produced over 150 items showing their true Pechanga heritage. (Louise Jeffredo's declaration, Tab 8 Docket 31 v.2 pg 57.)

[16] The majority lists three separate enrollment criterion found in the Constitution (see 4a) but only addresses the requirement in Section A. Assuming, arguendo, that the Hunters do not qualify under Section A, they do qualify under Section B because Paulina Hunter's descendants have been accepted as Tribal members "since 1928 in the Indian way" at the very least.

generally if specific problems could be solved by inspection of the labels pasted on them!" (*Trop*, *supra* at 94.)

c. The Appellate Court's Statement That Petitioners Are Not "Stateless" Disregards The Nature Of Pechanga Citizenship.

Congress granted Unites States citizenship to all Native Americans after WWI, by passing the Indian Citizenship Act of 1924 (43 Stat. 253, 8 U.S.C. § 1401(b). The assertion that loss of Indian identity is not significant because Lawrence Madariaga still holds his U.S. citizenship misses the point that Tribal life and indigenous living on Pechanga soil is his personal livelihood and that lifestyle existed long before the founding of the United States. Clearly, American citizenship came later to the culture of the Madariaga clan, and it did little to alter Lawrence's way of life.

The majority below discerned that Lawrence Madariaga was not left stateless and is still "Indian" in the broader sense, his loss as a *Pechanga* Indian is not a severe one, nor is it accompanied by any real physical and emotional restrictions. This view disregards the essence of Pechanga disenrollment—the taking away of his ethnic identity, his culture and even his political activity as a member of his Tribe. "The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty" Dissent at page 25a.

Lawrence can never show his face again at a meeting of other respected Tribal elders. The

Pechanga Reservation and its traditional practices are closed to the outside world.

> "The custom, tradition and practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members. Access to and residency within the Pechanga Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band."

Dissent at 13a-14a, quoting the Tribe's Non-Member Ordinance.

As *Poodry* eloquently concluded, "a deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence. *Poodry*, 85 F.3d at 897. Lawrence Madariaga was born a Pechangan and he wants to die one. He is asking for federal protection so that he does not die a non-Pechangan in the midst of an ever growing monetary enterprise known as the Pechanga Tribe.

4. The Lower Court's Interpretation Of The Exhaustion Of Internal Remedies Requirement Is So Extreme That No Native American Who Is Disenrolled (But Not Banished) Could Contest Their Loss Of Tribal Citizenship And Its Restrictions In Any State Or Federal Court.

Both parties agreed that Appellants had exhausted their tribal remedies regarding their disenrollment. The issue of failure to exhaust was not even discussed

in the district court opinion. However, the majority below ruled, in one paragraph, that Appellants did not exhaust their "claim of banishment." Majority at 16a. The only basis for this surprising ruling is the court's faulty contention that "Appellants argue that disenrollment is similar to banishment." *Id.* But Petitioners never put forth such an argument.

Petitioners clearly distinguished between disenrollment and banishment. Their argument, which the dissent understood, was that once they were disenrolled from their Tribe, they became non-members instantly and were treated antagonistically by tribal officials and tribal rangers who guard the entrance to the closed Reservation. Therefore, they now face a potential threat of banishment or exclusion.

The dissent accurately states Appellants' claim: "Appellants are not asserting jurisdiction based on any exclusion or eviction from the Pechanga Reservation. Rather, Appellants' claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion." Dissent at 30a.

In her dissent, Judge Wilken then cogently continues to explain why Petitioners had exhausted all possible tribal remedies.

> "Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment. Further, there does not appear to be any remedy available to Appellants if they were to be given a seven-day exclusion without warning.

> Appellants have exhausted their claims and their habeas petition is ripe for adjudication."

Dissent at 30a.

The consequence of the majority holding that for exhaustion purposes banishment is the same as disenrollment is to put an unbearable and unreasonable burden on tribal citizens (most of whom do not have resources) who are stripped of their citizenship, but not excluded from the reservation. It forces the disenrollee to go through the expense and time of a useless act of appealing their "banishment" even though they have not been banished. Such a ruling is illogical and contrary to the fundamental law of exhaustion of remedies.

CONCLUSION

For the foregoing reasons, Petitioners request that the High Court grant this Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-55037
D.C. No. CV-07-01851-JFW

[Filed December 22, 2009]

LOUISE VICTORIA JEFFREDO; JOYCE JEAN JEFFREDO-RYDER; CHRISTOPHER L. RYDER; JEREMIAH S. RYDER; JONATHAN B. RYDER; MICHAEL JOHN JEFFREDO; ELIZABETH VILLINA JEFFREDO; JACKIE M. MADARIAGA; KELLY M. MADARIAGA; CARRIE MADARIAGA; LAWRENCE MADARIAGA; WILLIAM A. HARRIS; STERLING HARRIS; APRIL HARRIS; MINDY PHENEGER; RICHARD HARRIS,
Petitioners-Appellants.

v.

MARK A. MACARRO; DONNA BARRON; MARC CALAC; MARK LUKER; ANDREW MASIEL; RUSSELL BUTCH MURPHY; KENNETH PEREZ; DARLENE AZZARELLI; CHRISTINE LUKER,
Respondents-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
April 17, 2009—Pasadena, California

Filed December 22, 2009

Before: Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges, and Claudia Wilken,* District Judge.

Opinion by Judge N.R. Smith;
Dissent by Judge Wilken

COUNSEL

Paul Harris and Patrick Romero Guillory, Dolores Park Law Offices, San Francisco, California, for the petitioners-appellants.

Frank Lawrence, Holland and Knight, Los Angeles, California, and John Schumacher, Law Office of John Schumacher, LLC, Riverton, Wyoming, for the respondents-appellees.

OPINION

N.R. SMITH, Circuit Judge:

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

The Pechanga Band of the Luiseño Mission Indians ("Pechanga Tribe") disenrolled a number of its members ("Appellants") for failing to prove their lineal descent as members of the Tribe. Federal courts generally lack jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Appellants, therefore, brought this petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA"), claiming their disenrollment by members of the Pechanga Tribal Council ("Appellees") was tantamount to an unlawful detention. Despite the novelty of this approach, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained. We hold that Appellants cannot bring their claims under § 1303 of the ICRA and therefore affirm the district court.

I. BACKGROUND

The Pechanga Tribe is a federally-recognized Indian tribe. 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007). The Tribe's ultimate governing authority consists of all of the adult members of the Tribe ("General Membership"). On December 10, 1978, the Pechanga Tribe adopted the Constitution and Bylaws of the Temecula Tribe of Luisenño Mission Indians ("Pechanga Constitution"). Article II of the Pechanga Constitution provides:

> Membership is an enrolled member documented in the Band's Official Enrollment Book of 1979.

Qualifications for membership of the Temecula Band of Luiseno Mission Indians Are:

A. Applicant must show proof of Lineal Descent from original Pechanga Temecula people.

B. Adopted people, family or Band, and non-indians cannot be enrolled. *Exception*: People who were accepted in the Indian Way prior to 1928 will be accepted.

C. If you have ever been enrolled or recognized in any other reservation you cannot enroll in Pechanga.

At issue here is subsection A, requiring applicants to "show proof of Lineal Descent from original Pechanga Temecula people." In late 2002 and early 2003, the Enrollment Committee received information from its members alleging that a number of Pechanga Tribe members were not lineal descendants from the original Pechanga Temecula people. Therefore, according to the Pechanga Enrollment Disenrollment Procedure ("Disenrollment Procedures"), the Enrollment Committee was required to investigate the allegations. Allegations surrounded five lines of descent that allegedly did not qualify for membership under the Pechanga Constitution.

According to the Pechanga Disenrollment Procedure, disenrollment is "revoking a person's membership when it is found that they do not meet the requirements set forth on the enrollment application which was approved by the Band." The Disenrollment

Procedures were adopted by the Pechanga Tribe (1) to correct mistakes that resulted when tribal membership was mistakenly approved and (2) to provide a process that would allow a fair hearing in the disenrollment procedure. Under the Disenrollment Procedures, the Enrollment Committee initiates a disenrollment process against those individuals allegedly not qualifying for membership in the Tribe. After the initiation of the disenrollment, the Enrollment Committee must provide adequate notice to the individual to be summoned to a meeting with the Enrollment Committee. The notice must (1) state that the Enrollment Committee has questions regarding enrollment; (2) stress the importance of responding to the notice; and (3) request a meeting within thirty days of the response. Unless the person receiving the notice chooses to be automatically disenrolled, he or she must respond. Once a response has been filed, the Enrollment Committee has thirty days to set up a meeting. At that meeting, the Enrollment Committee must show specific evidence that would prove that the documentation provided for enrollment does not provide evidence of lineal descent. If the Enrollment Committee provides such evidence, the individual then is allowed another thirty days to provide additional information to prove her or his lineal descent. If the individual provides further evidence that satisfies the Enrollment Committee as to his lineal descent, the process is terminated and the individual keeps his or her membership status. If the Enrollment Committee is not satisfied by the further evidence, the individual will be disenrolled and the Tribal Council is notified of the disenrollment.

If the Enrollment Committee fails to follow these steps or is negligent in any way, the individual can

appeal to the Tribal Council for a fair hearing. At the hearing, the Tribal Council only reviews the documentation that the Enrollment Committee reviewed. The individual is not entitled to legal representation at the hearing. If the Tribal Council finds there was an error, the Enrollment Committee reevaluates the case. If the appeal is successful, membership will be reinstated.

Disenrollment does not mean that a person is banished from the Pechanga Reservation. The Pechanga Tribe instead has specific procedures for exclusion and eviction. These requirements are set forth in the "Exclusion and Eviction Regulations." Under these regulations, the Pechanga Tribe may exclude and or evict someone from the reservation for: "(1) [v]iolating tribal laws and ordinances; (2) [c]reating conditions which pose a threat to the public health, safety and welfare; (3) [e]ngaging in criminal activities on the Pechanga Reservation, by finding of the Tribal Council, or being convicted of one or more felony crimes; (4) [b]eing declared a public nuisance by the Tribal Council; [or] (5) [c]reating a breach of peace, including but not limited to public drunkenness." The Exclusion and Eviction Regulations dictate the procedure to evict and or exclude and the opportunity to appeal such exclusion.

In early 2003, the Enrollment Committee began addressing the allegations regarding the lineal descent of certain members. On March 7, 2003, the Tribal Council issued a Notice and Order regarding pending disenrollment matters. The Notice and Order mandated that the Enrollment Committee: (1) "use a fair and impartial decision by a majority of the committee to review a file;" (2) follow Robert's Rules of

Order; and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures.

Sometime before March 7, 2003, the Enrollment Committee determined that the first three lines of descent met the membership criteria. Then it turned its attention to those members who claimed a lineal descent through Paulina Hunter. On May 3, 2005, after a proper vote, the Enrollment Committee summoned Appellants and notified them that the Enrollment Committee believed there were grounds to initiate the disenrollment process. The summonses (1) notified Appellants that the disenrollment procedures had been initiated, (2) requested additional information concerning Appellants' family history, and (3) notified Appellants that they were required to set up an Initial Meeting with the Enrollment Committee.

Meetings were held with Appellants in June of 2005. The Enrollment Committee provided Appellants with a copy of all factual records in its possession. The Enrollment Committee then stated its concerns about each Appellant's claim of lineal descent. Appellants were also notified that they had thirty days to submit information supporting their claim of lineal descent. The Enrollment Committee emphasized that Appellants' enrollment would be measured by the Pechanga Constitution's requirements. The Enrollment Committee advised each Appellant that no decision would be made until it received all additional information.

On March 16, 2006, the Enrollment Committee (after review of the full record) disenrolled Appellants for failure to prove lineal descent from an original

Pechanga Temecula person. Appellants exercised their right to appeal to the Tribal Council. The Tribal Council held hearings on July 21, 2006. The Tribal Council affirmed the Enrollment Committee, "finding: (1) there was no evidence of unfair or partial treatment of Appellants by the Enrollment Committee; (2) there was no evidence of negligence in the handling of Appellants' case by the Enrollment Committee; and (3) there was insufficient proof that the Enrollment Committee violated the disenrollment procedures."

Appellants then filed a petition for writ of habeas corpus in the Central District of California. Appellants moved for summary judgment. Appellees filed a Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, claiming that the district court lacked subject matter jurisdiction. The district court granted the Motion to Dismiss. Appellants appealed the district court decision here.

II. DISCUSSION

We review *de novo* dismissals for lack of subject matter jurisdiction under Rule 12(b)(1). *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004). We also review *de novo* a district court's denial of a petition for writ of habeas corpus under the ICRA. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998).

Ordinarily, federal courts lack jurisdiction to consider an appeal from the decision of an Indian Tribe to disenroll one of its members. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*,

436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). Because of this precedent, Appellants did not directly appeal the Tribe's decision. Instead, they petitioned the court for a writ of habeas corpus under the ICRA to collaterally challenge their disenrollment.

[1] Section 1303 of the ICRA provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The term "detention" in the statute must be interpreted similarly to the "in custody" requirement in other habeas contexts. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) ("There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other habeas statutes." (citation omitted)). Therefore, an ICRA habeas petition is only proper when the petitioner is in custody. *Id.* at 791 (explaining the custody requirement).

We have also held that a litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus. *Selam*, 134 F.3d at 953-54 (explaining the exhaustion requirement); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* § 9.09 (2005). Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to "stay its hand" until the party has exhausted all available tribal remedies. Cohen, *Handbook of Federal Indian Law* § 7.04 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)). "The Supreme Court's policy of nurturing

tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam*, 134 F.3d at 953. There is authority for relaxing the exhaustion requirement where the party can show that exhaustion would be futile or that tribal courts offer no adequate remedy. *See id.* at 954.

[2] Therefore, "all federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the IRCA: [(1)] The petitioner must be in custody, and [(2)] the petitioner must first exhaust tribal remedies.". Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n.280. We therefore have no jurisdiction to hear a petitioner's claim for habeas corpus, unless both of these conditions are met.

Additionally, some courts have further imposed a third requirement; that the tribal proceeding be criminal and not civil.[1] *See, e.g.*, *Quair v. Sisco* (*Quair I*), 359 F. Supp. 2d 948, 963 (E.D. Cal. 2004); *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1127 (D. Ore. 1999); *see also* Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n.280 (noting that while custody and exhaustion are prerequisites before a reviewing court will hear a habeas petition, courts have "struggled" with whether there is also a third requirement that the proceedings be criminal in nature).

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[1] The dissent focuses on the distinction between civil and criminal actions. However, it should be noted that while this distinction has been mentioned by some courts, the distinction is immaterial unless the first two requirements of custody and exhaustion are met.

I. Appellants do not meet the requirements for the court to have jurisdiction under § 1303 of the ICRA.

A. Appellants were not detained/in custody.

Appellants contend that (1) the actual restraints, (2) the potential restraints, and (3) their lost Pechanga identity all amount to detention under § 1303. We do not agree.

1.

[3] Appellants contend that, because they have been denied access to the Senior Citizens' Center, cannot go to the health clinic, and their children can no longer go to tribal school, they have been detained. We disagree. *Jones v. Cunningham* requires that "conditions and restrictions . . . significantly restrain [one's] liberty" in order to invoke § 1303 jurisdiction. 371 U.S. 236, 243 (1963). The Second Circuit has said that "under *Jones* and its progeny, a severe actual or potential restraint on liberty" is necessary for jurisdiction under § 1303. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996); *see also Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003) (quoting *Poodry* for the same proposition). We agree with our colleagues on the Second Circuit and hold that § 1303 does require "a severe actual or potential restraint on liberty." *Poodry*, 85 F.3d at 880.

[4] In the case before us, the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the

Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation. Faced with a similar situation, the Second Circuit also determined that less severe restraints such as loss of one's "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one's place on the membership roles of the tribe are simply "insufficient to bring plaintiffs within [the] ICRA's habeas provision." *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998).

[5] Appellants contend that the denial of access to these facilities is similar to the restraint found in *Poodry*. This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. *See Poodry*, 85 F.3d at 876, 878. Appellants have not been convicted, sentenced, or permanently banished. We therefore hold that the limitation of Appellants' access to certain tribal facilities does not amount to a "detention."

2.

[6] Appellants contend that, as non-members of the tribe, they are "under a continuing threat of banishment/exclusion." No court has held that such a threat is sufficient to satisfy the detention requirement of § 1303.

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Hensley v. Mun. Court, 411 U.S. 345, 351 (1973). Applying this principle, we previously held that a threat of confinement is not severe nor immediate enough to justify the remedy. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40-41 (9th Cir. 1975) (denying habeas relief under 28 U.S.C. §§ 2241, 2254). In *Edmunds*, the petitioner was subject to a court-imposed fine, which could be enforced by jail time. *Id.* at 41. The court held, however, that until confinement is imminent (like the confinement in *Hensley*) there can be no justification for use of the habeas corpus remedy. *Id.* We see no reason not to analogize to the court's construction of the criminal habeas corpus provisions in *Edmunds*. Therefore, we hold that the potential threat of future eviction is not sufficient to satisfy the detention requirement of § 1303.

[7] Appellants argue that, while no such procedures have been commenced to exclude or evict Appellants, there is a potential that they could be excluded. Under the Pechanga Non-Member Reservation Access and Rental Ordinance "[a]ccess to and residency within the Reservation is a privilege which may be granted or

denied to an individual upon proper authority of the Pechanga Band." However, the Pechanga Tribe enacted exclusion and eviction regulations that provide a process for eviction in an effort to protect law and order on the reservation and to provide uniform procedures for exclusion and eviction. These provisions apply equally to those who have been disenrolled and those who are current members of the tribe. Appellants admit they have never been subjected to exclusion or eviction proceedings.

3.

[8] Appellants lastly contend that disenrollment, stripping them of their Pechanga citizenship, is enough of a significant restraint on their liberty to constitute a detention. While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303. While "Congress' authority over Indian matters is extraordinarily broad . . . the role of courts in adjusting relations between and among tribes and their members [is] correspondingly restrained." *Santa Clara Pueblo*, 436 U.S. at 71. Further, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 71 n.32 (citing *Roff v. Burney*, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76). Thus (while Congress may have authority in these matters) in the complete absence of precedent, we cannot involve the courts in these disputes.

[9] This court is without jurisdiction to review direct appeals of tribal decisions regarding

disenrollment of members. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 72 n.32. We cannot circumvent our lack of jurisdiction over these matters by expanding the scope of the writ of habeas corpus to cover the exact same subject matter. At its heart, this case is a challenge to disenrollment of certain members by the tribe. It is precisely because we lack jurisdiction to hear such claims, however, that Appellants brought this case under habeas corpus law. We find (and the parties direct us to) nothing in the legislative history of § 1303 that suggests the provision should be interpreted to cover disenrollment proceedings. Because nothing in the legislative history suggests otherwise and because binding precedent precludes review of disenrollment proceedings, we cannot accept Appellants' invitation to expand habeas corpus here.

[10] Appellants contend that their disenrollment is analogous to denaturalization. We disagree. Appellants cite *Trop v. Dulles*, 356 U.S. 86 (1958), to support this proposition. The court in *Trop* was confronted with the constitutionality of a statute that revoked United States citizenship for desertion during wartime even if the desertion was unrelated to any actions on behalf of a foreign government. *Id.* at 87-88. *Trop* is inapposite to this case. In *Trop* the statute left the defendant stateless. *Id.* Further, the statute was penal in nature. *Id.* at 96. Here Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants. Therefore, *Trop* is not controlling.

B. Appellants have not exhausted their tribal remedies in order to challenge a claim of banishment from the reservation.

[11] Appellants argue that disenrollment is similar to banishment and that they are therefore detained. However, Appellants have not been banished from the Reservation. The Pechanga Tribe has established uniform Exclusion and Eviction Regulations for excluding both members and nonmembers of the tribe from the Reservation. The Exclusion and Eviction Regulations also establish the procedures for appealing one's exclusion or eviction. Appellants have not been subjected to any exclusion or eviction proceedings. Therefore, they have not exhausted their claims for exclusion from the reservation or denial of access to it as established in the Exclusion and Eviction Regulations. We then lack jurisdiction over any of Appellants' claims for exclusion or eviction.

C. The tribal proceeding was not criminal in nature.

[12] Failure to establish detention alone is sufficient to defeat a habeas claim under the ICRA. However, because some courts also require that ICRA habeas petitions be criminal proceedings, we address that issue here. The parties agree that the disenrollment procedures are civil proceedings. Whether habeas relief under the ICRA can be granted in a non-criminal context is an issue of first impression for this court. Three of our circuit's district courts have previously determined that § 1303 only applies to tribal criminal proceedings. *See Quair v. Sisco* (*Quair II*), 2007 WL 1490571 *2 (E.D. Cal. May 21, 2007) ("Petitioners seeking relief under § 1303 must

establish that . . . the proceeding at issue is criminal and not civil in nature . . . ." (citing *Quair I*, 359 F. Supp. 2d at 963)); *Alire*, 65 F. Supp. 2d at 1127 ("[W]rit of habeas corpus available under section 1303 is limited to unlawful detentions arising out of tribal criminal decisions."). We agree.[2]

[13] The Supreme Court has found that habeas corpus under the ICRA is "the exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo*, 436 U.S. at 67. The Court has also found that "Congress considered and rejected proposals for federal review of alleged violations of the [ICRA] arising in a civil context." *Id.* We also note "[i]n interpreting § 1303, courts should hesitate to so expand the meaning of 'criminal' and 'detention' such that, as a practical matter, all tribal decisions affecting individual members in important areas of their lives become subject to review in federal court. Such a result would be inconsistent with the principle of broad, unreviewable tribal sovereignty in all but criminal cases involving physical detention." *Quair II*, 2007 WL 1490571 at *2. Lastly, "[g]iven the often vast gulf between tribal traditions and those with which federal

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[2] The dissent points to *Duncan v. Walker*, 533 U.S. 167 (2001), to support the argument that habeas is available in civil actions as well as criminal. We disagree with this characterization of *Duncan*. *Duncan* was addressing the one year limitation period under the Antiterrorism and Effective Death Penalty Act (AEDPA). Specifically, the Court in *Duncan* was discussing what qualifies as "in custody" under AEDPA for purposes of calculating the time limit. *Id.* at 176. The Court noted that some civil actions (such as commitment to a mental institution and civil contempt, *id.*) "may" satisfy this custody requirement. *Id.* We do not find that this precedent bears on whether ICRA habeas petitions are available in civil proceedings.

courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

Appellants contend that both *Poodry* and *Quair I*, support their position that habeas relief may be granted in a civil tribal proceeding. We disagree. In *Poodry*, the petitioners were convicted of "treason" and sentenced to banishment from the Tonawanda Reservation. *Poodry*, 85 F.3d at 876. The specific issue addressed in *Poodry* was whether § 1303 of the ICRA "allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve 'banishment' rather than imprisonment." *Id.* at 879. The Second Circuit performed an extensive analysis of whether a habeas petition could be brought in a civil context, but ultimately stated, "[b]ecause we conclude the tribal action in this case indeed arose in a criminal context, we ultimately need not resolve the question of whether habeas review is restricted to cases involving a tribal criminal conviction." *Id.* at 888. Therefore, any citation to *Poodry* for the proposition that habeas relief may be granted from a civil tribal proceeding would be dicta.

The allegations in *Quair I* were also criminal in nature. In fact, the court in *Quair I* found that petitioners seeking relief under § 1303 must establish that the proceeding at issue is criminal and not civil in nature. *Quair I*, 359 F. Supp. 2d at 963. These decisions, therefore, do not support Appellants' position that habeas relief may be granted from a civil tribal proceeding.

[14] Because the extension of habeas relief to civil proceedings would circumvent tribal sovereignty and cause undue or precipitous interference with matters such as enrollment, we hold that Appellants in this case are not eligible for relief under the ICRA habeas provision.

III. CONCLUSION

The district court properly dismissed Appellants' action for lack of subject matter jurisdiction. Appellants were not detained, did not exhaust their tribal remedies, and their disenrollment was the result of a civil proceeding. Therefore, they cannot get relief under the habeas corpus provision of the ICRA. Accordingly, we affirm the district court.

AFFIRMED.

Wilken, District Judge, dissenting:

Appellants, enrolled members of the Pechanga Tribe since birth, filed a petition for a writ of habeas corpus under the Indian Civil Rights Act (ICRA) asserting that their Tribal Council violated the due process, equal protection, free speech and cruel and unusual punishment clauses of the Act when it stripped them of membership in the Tribe. The membership criteria that the Tribal Council applied were not established until 1979; the procedures it used to disenroll Tribal members were not established until 1988; and the Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe's casino profits became a major source of revenue.[1] Appellants allege that they are victims of the Tribal Council's greed associated with these casinos.

The majority concludes that the district court properly dismissed Appellants' petition for lack of subject matter jurisdiction because Appellants (1) were disenrolled as the result of a civil proceeding, (2) were not detained and (3) did not exhaust their Tribal remedies. I respectfully dissent and address each argument in turn.

I. Indian Civil Rights Act (ICRA)

Beginning in 1961, through hearings and surveys, Congress commenced an investigation into the conduct of tribal governments due to abuses that some tribal members were enduring at the hands of tribal officials.

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[1] At the time of Appellants' disenrollment, every adult Pechangan received a per capita benefit of over $250,000 per year.

In 1968, Congress enacted ICRA to protect against such abuses by imposing restrictions upon tribal governments similar to those contained in the Bill of Rights and the Fourteenth Amendment. The enforcement mechanism Congress provided was that of habeas corpus in federal courts. 25 U.S.C. § 1303. A central purpose of ICRA was to " 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

A. Criminal v. Civil Action

I disagree with the majority's view that ICRA provides a federal court with jurisdiction to review only a tribal criminal proceeding, not a civil proceeding.

The plain language of § 1303 does not limit the court's habeas jurisdiction to criminal proceedings. Section 1303 simply provides, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

In other contexts, the writ of habeas corpus has historically been available to contest detention resulting from civil proceedings. *See, e.g., Rex v. Clarkson*, 1 Strange 444 (K.B. 1720); *Gegiow v. Uhl*, 239 U.S. 3 (1915). The Supreme Court has held more recently that nothing in the language of the provisions for federal habeas relief for a person in custody pursuant to the judgment of a state court "requires

that the state court judgment pursuant to which a person is in custody be a criminal conviction." *Duncan v. Walker*, 533 U.S. 167, 176 (2001). As examples, the Court cited cases in which federal courts had applied federal habeas review to petitions brought "to challenge the legality of a state court order of civil commitment or a state court order of civil contempt." *Id.* (citations omitted). No reason appears in the plain language of § 1303 to give it a narrower "reach than [the] cognate statutory provisions governing collateral review of state and federal action[s]." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879-80 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996).

The majority relies primarily on *Santa Clara Pueblo* to support its conclusion. In that case, a female member of the Santa Clara Pueblo Indian tribe and her daughter brought suit in federal court against the tribe and its governor seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe.

The issue before the Supreme Court in *Santa Clara* was whether ICRA could be "interpreted to impliedly authorize" the "bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions." *Santa Clara*, 436 U.S. at 51-52. The Court held that it could not.

The Court stated that its holding was "strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303." *Id.* at 66. As part of its discussion of

the legislative history, the Court explained that Congress had considered and rejected two proposals that would have allowed for "federal review of alleged violations of the Act arising in a civil context." *Id.* at 67. One of these proposals would have required the Attorney General to prosecute deprivations of an Indian's statutory or constitutional rights and the other would have authorized the Department of the Interior to adjudicate civil complaints concerning tribal actions. *Id.* at 67-68. While Congress rejected these two particular proposals, the legislative history does not indicate that it rejected any possible review of civil proceedings, and the Court did not so find.

The Court also noted, "In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive mechanism than had been initially proposed." *Id.* at 67. (The initial proposal to which the Court referred here would have allowed for de novo review in federal court of all convictions in tribal courts.) From the premise that habeas corpus is the exclusive means for review of criminal proceedings, it does not follow as a matter of logic or grammar that habeas corpus is a means that can be used to review criminal proceedings exclusively. In other words, the Court's statement does not preclude habeas review of civil proceedings that result in detention. The Court held only that habeas corpus, and not any other federal remedy such as a direct appeal, is provided by ICRA. The Court had no need to, and did not, decide that habeas jurisdiction under ICRA applied only to criminal proceedings. Such is the Second Circuit's interpretation of the case: "*Santa Clara Pueblo* obviously does not speak directly to the scope of Title I's habeas provision, which was a matter not raised in

that case." *Poodry*, 85 F.3d at 887. In *Poodry*, the Second Circuit also found that "it is not possible to draw from [ICRA's] legislative history a definitive conclusion as to whether Congress intended that habeas review be restricted to criminal convictions, or whether other circumstances of 'detention' by a tribal court order could trigger habeas review." *Id.* at 888.

The fact that the challenged proceedings in the case before us were civil, not criminal, does not, in my view, bar the district court from hearing the matter under § 1303.

B. Detention

"Detention" by order of an Indian tribe is the sole jurisdictional prerequisite for federal habeas review. The requirement in § 1303 that an individual be "detained" is akin to the "in custody" and "detention" requirement in other habeas statutes. *Poodry*, 85 F.3d at 891 ("Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context."). The habeas statutes analogous to § 1303 refer to "detention" as well as "in custody" throughout. *See* 28 U.S.C. §§ 2242, 2243, 2245, 2249, 2253 and 2255. "There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001). Nor is there any reason to conclude that the requirement of "detention" in § 1303 is any more strict than the requirement of "custody" or "detention" in the other federal habeas statutes.

The custody or detention requirement may be met if the habeas petitioner is not physically confined. *Jones v. Cunningham*, 371 U.S. 236, 239-40 (1963); *see Dow v. Court of the First Circuit Through Huddy*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted custody; requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do"), *cert. denied*, 510 U.S. 1110 (1994).

This requirement is designed to limit the availability of habeas review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Therefore, the inquiry into whether a petitioner has satisfied the jurisdictional prerequisites for habeas review requires a court to judge the "severity" of an actual or potential restraint on liberty.

The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty. The majority analyzes each of these grounds separately, instead of collectively, and determines that none amounts to a detention. I respectfully disagree with this approach.

When Tribal members are disenrolled, they become "non-members" of the Tribe and lose all rights associated with being a Pechanga citizen. One of those rights is access to the Pechanga Reservation. The Pechanga Non-Member Reservation Access and Rental Ordinance (Reservation Access Ordinance) states, "The

custom, tradition and practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members. Access to and residency within the Pechanga Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band."

Elsewhere, the Reservation Access Ordinance provides, "Use by non-members of roads within the Pechanga Reservation is . . . by permission of the Tribal Council and is subject to revocation at any time and for any reason." The Ordinance establishes that a non-member may enter the Pechanga Reservation only upon invitation by the Tribal Council or by an enrolled member of the Pechanga Band. Otherwise, access to the Pechanga Reservation by non-members is prohibited.

Since being disenrolled, Appellants have been excluded from the school, the health clinic and the senior citizens' facilities on the Reservation. Some of the Appellants live on the Reservation. Although they may enter the Reservation and travel to their homes, any Tribal Ranger can take away that liberty at any moment.

Pechanga Tribal Rangers have the authority and discretion summarily to exclude non-members from the Pechanga Reservation for up to seven days for any of the following reasons:

(1) suspicion that a non-member has committed a violation of any applicable tribal, state or federal law within the Pechanga Reservation;

(2) suspicion that a non-member is a danger to himself, herself or others;

(3) a finding by a Tribal Ranger that a non-member is a public nuisance; or

(4) any behavior which is suspicious or not consistent with a legitimate visit either to a tribal enterprise for business or patronage purposes, or to the home of a resident of the Pechanga Indian Reservation by invitation and in compliance with the Non-Member Reservation Access and Rental Ordinance.

Thus, a parent could, without warning, be barred from going home for a week by a Tribal Ranger who observes "any behavior that is suspicious." That Appellants have not been removed thus far does not render them free or unrestrained. Appellants may currently be able to "come and go" as they please, *cf. Hensley*, 411 U.S. at 351, but their current status as non-members living on the Pechanga Reservation means that at any point they may be compelled to "go," and be no longer welcome to "come." That is a severe restraint to which the members of the Pechanga Band are not generally subject. *See id.*

The majority analogizes the severe restraint Appellants confront with that in a case involving a twenty-five dollar fine. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975). In that case, the court held that Edmunds was not subjected to a severe restraint because there was "no provision in the sentence for his confinement in the case of

non-payment." *Id.* The court generally observed that "a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders." However, in the circumstances of *Edmunds*, "confinement [was] no more than a speculative possibility — 'the unfolding of events may render the entire controversy academic.' " *Id.* (quoting *Hensley*, 411 U.S. at 352). Analogizing the current and potential penalties involved in this case with a twenty-five dollar fine and the speculative possibility that failure to pay the fine may result in judicial proceedings leading to confinement trivializes the severity of Appellants' situation.

Furthermore, Appellants have been stripped of their life-long Pechanga citizenship, which by itself constitutes a severe deprivation. A deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes." *Klapprott v. United States*, 335 U.S. 601, 611-12 (1949). The Supreme Court has found the penalty of denationalization of a natural-born citizen, sought to be imposed after conviction for military desertion, to be unconstitutional. *See Trop v. Dulles*, 356 U.S. 86, 104 (1958).

> It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.
>
> . . . .
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It

> subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. at 101-102. A "deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." *Poodry*, 85 F.3d at 897. Although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association. William C. Canby, Jr., *American Indian Law in a Nut Shell* §§ III.B-C (5th ed. 2009); Felix S. Cohen, *Handbook of Federal Indian Law* § 3.03 (2005). Such a loss constitutes a restraint on liberty that, combined with the actual and potential restraints described above, satisfies the detention requirement under § 1303, in my opinion.

C. Exhaustion

The majority concludes that we lack jurisdiction over any claims for exclusion or eviction because Appellants have not exhausted their Tribal remedies

for such claims or demonstrated that exhaustion would be futile. But Appellants are not asserting jurisdiction based on any exclusion or eviction from the Pechanga Reservation. Rather, Appellants' claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion. Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment. Further, there does not appear to be any remedy available to Appellants if they were to be given a seven-day exclusion without warning. Appellants have exhausted their claims and their habeas petition is ripe for adjudication.

II. Conclusion

When viewed together, the act of stripping Appellants' Tribal citizenship and the current and potential restrictions placed upon Appellants constitute a severe restraint on their liberty. Therefore, Appellants have been detained within the meaning of § 1303. Accordingly, I would reverse and remand to the district court to hear their petition for a writ of habeas corpus on its merits.

APPENDIX B

JS-6/Ent

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-1851-JFW (PLAx)

[Date: December 4, 2007]

Louise Victoria Jeffredo, et al.	)
-v-	)
Mark A. Macarro, et al.	)
	)

CIVIL MINUTES -- GENERAL

PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1) [filed 10-12-07; docket no. 25]

On October 12, 2007, Respondents Mark A. Macarro, Donna Barron, Mark Calac, Marc Luker, Andrew Masiel, Russell "Butch" Murphy, Kenneth Perez, Darlene Assarelli, and Christine Luker (collectively, "Respondents") filed a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) ("Motion"). On November 14, 2007, Petitioners Louise Victoria Jeffredo, Joyce Jean Jeffredo-Ryder, Christopher L. Ryder, Jeremiah S. Ryder, Jonathan B. Ryder, Michael John Jeffredo, Elizabeth Villiana Jeffredo Warden, Jackie M. Madariaga, Kelly M. Madariaga, Carrie Madariaga, Lawrence Madariaga, William A. Harris, Sterling Harris, April Harris, Mindy Pheneger, and Richard Harris (collectively, "Petitioners") filed their Opposition. On November 26, 2007, Respondents filed a Reply.[1] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found

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[1] On November 29, 2007, Petitioners filed a Request for Sanctions. On November 30, 2007, Respondents filed a Response to Petitioners' Request for Sanctions. Petitioners request sanctions because Respondents Reply was 23 pages, which is in excess of the 12 pages allowed for Replies in Section4(b) of the Court's Standing Order. Alternatively, Petitioners request that they be allowed to file a brief sur-reply addressing *Quair v. Sisco*, 2007 WL 1490571, *2 (May 21, 2007) ("*Quair II*"). While Respondents did violate the Court's Standing Order, the Court will not impose sanctions. In addition, the Court does not require additional briefing on *Quair II* because it is not a new matter and was raised in Respondent's Motion. Motion, p. 20. Accordingly, Petitioner's Request for Sanctions is **DENIED**.

the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's December 3, 2007, hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

On May 22, 2007, Petitioners filed their Petition for Writ of Habeas Corpus with this Court. This action arises out of the decision of the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation ("Pechanga Band") to disenroll Petitioners as members of the Pechanga Band for failure to meet its membership criteria. Most of the Respondents are members of the Pechanga Band's elected Tribal Council, while Respondent Darlene Azzerelli is Tribal Secretary and Respondent Christine Luker is a tribal member.

The Pechenga Band is a federally-recognized Indian tribe. 72 Fed. Reg. 13648, 13649 (Mar. 7, 2007). On December 10, 1978, the Pechanga Band's General Membership, which is composed of all adult members of the Pechanga Band and the ultimate governing authority, adopted the Pechanga Constitution. Article II of the Pechanga Constitution outlines the qualifications for membership, which includes demonstrating Lineal Descent from an original Pechanga person. On October 12, 1988, the General Membership adopted the Pechanga Band Disenrollment Procedures, which were adopted to correct mistakes made in enrolling persons in the Pechanga Band.

In 2002 and early 2003, the Enrollment Committee was advised that a number of members of the Pechanga Band allegedly failed to meet the Pechanga Constitution's membership qualifications. Following these allegations, the Enrollment Committee commenced an investigation pursuant to Section 2 of the Disenrollment Procedures. The tribal members that were subject to the Disenrollment Procedures petitioned the General Membership to amend the Disenrollment Procedures and to stay all pending disenrollment proceedings until amendments were enacted. On February 23, 2003, the General Membership voted to reject the petition at a duly noticed and convened meeting. On March 7, 2003, the Tribal Council issued a Notice and Order regarding the then-pending disenrollment proceedings and how those proceedings would be conducted.

On May 3, 2005, the Enrollment Committee sent summonses to Petitioners, all of whom claimed membership in the Pechanga Band as a lineal descendant of Paulina Hunter, which notified Petitioners that Disenrollment Procedures had been initiated against each of them and provided Petitioners with information explaining the Disenrollment Procedures. On March 16, 2006, the Enrollment Committee, after a review of the record, held that Petitioners were disenrolled for failure to prove lineal descent from an original Pechanga Temecula person. Petitioners appealed the decision to the Tribal Council, which upheld the disenrollment decisions on July 21, 2006. None of the Petitioners had been denied access to the Reservation since the disenrollment decisions.

On October 12, 2007, Respondents filed their Motion to Dismiss pursuant to Rule 12(b)(1), claiming

that this Court lacks subject matter jurisdiction to hear this case.

II. Legal Standard

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff['s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); *see also Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. . . '[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material

facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

III. Discussion

In their Petition, Petitioners ask this Court to review the decision of the Pechanga Band to disenroll Petitioners as members for failure to meet its membership criteria. However, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *see, also, Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) ("An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress."). In fact, "[t]he courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.), p. 20. The power of tribes to determine who will be members has long included the

power to revoke that membership. *Roff v. Burney*, 168 U.S. 218, 222 (1897) ("The citizenship which the Chickasaw legislature could confer it could withdraw."); *see, also, Red Bird v. United States*, 203 U.S. 76, 81-84 (1906) (finding that Cherokee Nation had authority to qualify citizenship rights, including providing for revocation of citizenship rights). Because Indian tribes' ability to make membership decisions is well-established, it is also well-established that the district courts do not have jurisdiction in cases involving disputes over membership issues. *In re Sac & Fox Tribe of Mississippi Iowa/Meskwak Casino Litigation*, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts."); *see, also, Williams*, 490 F.3d at 789 ("Even where there is some legal constraint on tribes, 'without congressional authorization, the Indian Nations are exempt from suit.'") (*quoting Santa Clara Pueblo*, 436 U.S. at 56); *Santa Clara Pueblo*, 436 U.S. at 71 ("the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State governments."); *and Alvarado v. Table Mountain Rancheria*, __ F.3d __, 2007 WL 4198261, *6 (9th Cir. Nov. 29, 2007) ("Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe.").

Despite the above case law, Petitioners argue that Section 1303 of the Indian Civil Rights Act ("ICRA") – the habeas provision – provides a basis for jurisdiction in this case. However, on its face, Section 1303 is limited to situations involving detention: "The

privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. In addition, the Supreme Court has found that habeas corpus under the ICRA is "the exclusive means for federal-court review of tribal ***criminal*** proceedings" and also noted that "Congress considered and rejected proposals for federal review of alleged violations of the [ICRA] arising in a civil context." *Santa Clara Pueblo*, 436 U.S. at 60-61 & 66-67 ("Although Congress clearly has the power to authorize civil actions against tribal officials and has done so with respect to habeas corpus relief in §1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.") (Emphasis added). Therefore, based upon the Supreme Court's findings in *Santa Clara Pueblo*, many courts have found that "Petitioners seeking relief under § 1303 must establish that: (1) the proceeding at issue is criminal and not civil in nature; (2) the Tribe is detaining them; and (3) they have exhausted all available tribal remedies." *Quair v. Sisco*, 2007 WL 1490571, *2 (May 21, 2007) ("*Quair II*"); *see, also, Alire v. Jackson*, 65 F.Supp. 2d 1124, 1127 (D. Or. 1999).

In this case, Petitioners cannot demonstrate either that the proceedings against them were criminal in nature or that they have been physically detained. In fact, Petitioners do not argue, nor do any facts in either their Petition or the declarations submitted with their Opposition to Respondents' Motion support such an argument, that their disenrollment arose out of a criminal proceeding. Instead, Petitioners simply argue that habeas review should apply to civil

proceedings. While that argument is unpersuasive for the reasons stated above, it also is not supported by the two cases cited by Petitioners, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996) and *Quair v. Sisco*, 359 F. Supp. 2d 948 (2004) ("*Quair I*"). *Poodry* involved tribal members who were convicted of "treason" and sentenced to disenrollment and permanent banishment from the reservation. In concluding that it did have jurisdiction in the case, the court found that "[b]ecause we conclude the tribal action in this case indeed arose in a criminal context, we ultimately need not resolve the question of whether habeas review is restricted to cases involving criminal convictions." *Poodry*, 85 F.3d at 888. In *Quair I*, the petitioner was banished from the reservation and disenrolled as a member due to "betrayal" and "treason." *Quair*, 359 F. Supp. 2d at 953. As in *Poodry*, the court found it had jurisdiction because the proceeding leading to the banishment and disenrollment was criminal in nature. *Id.* at 963. Moreover, in *Quair II*, the court clarified that banishment and disenrollment were separate sanctions, and found that it did not have jurisdiction with respect to disenrollment proceedings because disenrollment did not affect "physical freedom to a degree that it may be considered tantamount to detention." *Quair*, 2007 WL at *4.

Moreover, Petitioners cannot demonstrate that they were physically detained. Petitioners argue that they have been "detained" for Section 1303 purposes because (1) they have been geographically restrained; (2) they face potential geographical restraint; and (3) their Pechanga identity has been lost. Opposition, pp. 6:12-8:10. These claimed "detentions" are not supported by the law or the facts. Petitioners concede

in their Opposition that they have not been banished from the Reservation, and the declarations submitted in support of their Opposition support this concession. Opposition, p. 8:14-15. In fact, two of the Petitioners, Mr. Jeffredo and Mr. Madariaga, state in their declarations that they still reside on the Reservation, and none of the declarations contain allegations that Petitioners have been denied access to the Reservation or otherwise physically detained. The only losses cited by Petitioner in their Petition, Opposition, and supporting declarations relate to the loss of privileges and other benefits, such as loss of privileges at the health clinic, loss of use of the pre-school and elementary school, and loss of the right to use the Elder Organization. *See, e.g.*, Petition, ¶ 12; Opposition, p. 6:14-21. However, the losses of those types of rights and privileges do not constitute detention for purposes of Section 1303. *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 286 (N.D.N.Y. 2003) (holding that loss of housing, heating assistance, government payments, tribal privileges, limits on access to tribal facilities, and loss of "voice" are economic and property restraints, not actual liberty interests). As the court concluded in *Quair II*:

> [p]etitioners have failed to show that disenrollment, separate from banishment, restricts their physical freedom in any way. While banishment requires a person – whether a member of the Tribe or not – to leave the reservation, disenrollment strips a member of tribal membership that attend upon such membership. [Citation omitted] In this case, all the benefits are financial, such as monthly per capita payments that come from the Tribe's gaming revenue. According to respondents,

> nonmembers may live on the reservation, a point that petitioners do not dispute. . . .
>
> Section 1303 grants federal courts jurisdiction to review the "legality of [petitioner's] detention" and not penalties that, while harsh, do not constitute detention. Therefore, the court finds that § 1303 is simply inapplicable to the disenrollment of petitioners.

Petitioners also argue that they theoretically "could be" denied access to the Reservation at any time. However, such mere speculation does not support habeas jurisdiction in this case. *See, e.g., Edmunds v. Chang*, 509 F.2d 39, 41 (9th Cir. 1975). Accordingly, the Court finds that it lacks jurisdiction in this case.

IV. Conclusion

For all the foregoing reasons, the Court **GRANTS** Defendants' Motion. Petitioners' Petition is hereby **DISMISSED with prejudice** for lack of jurisdiction.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

(Rev. 10/1/04) Initials of Deputy Clerk sr

APPENDIX C

[SEAL]

SANTA BARBARA MUSEUM OF NATURAL HISTORY
2559 Puesta del Sol Rd. Santa Barbara, CA 93105 (805) 682-4711, ext. 139

June 20, 2006

Pechanga Tribal Council
Pechanga Indian Reservation
Temecula Band of Luiseño Mission Indians
P. O. Box 1477
Temecula, CA 92953

Dear Council Members:

I am writing to respond to the Record of Decision issued March 16, 2006 by the Pechanga Enrollment Committee regarding disenrollment of the lineal descendants of Paulina Hunter. I was surprised and dismayed when I read the "Conclusions" section on pages 25-26 of that decision, because I felt that many of the conclusions were either based on misinterpretations of the documentary evidence or unjustified by what had been presented earlier in the text of the Record of Decision.

In the summer and fall of 2004, I prepared a report on "The Ancestry of Paulina Hunter" at the request of the Pechanga Enrollment Committee. Although the

Committee references this report in its list of documents that it reviewed (Doc. 14 on p. 4), my findings were completely overlooked in the Record of Decision.

In the report that I prepared at the Enrollment Committee's behest, I reviewed the genealogical clues to Paulina Hunter's background. The preponderance of the evidence indicates that Paulina Hunter's father was Mateo Quasacac, who was the *only* Indian listed as having been born at "Pichanga" in the surviving early records of Mission San Luis Rey. Mateo Quasacac was also the father of Michaela Quilig ("Michella Quilich"), a life-long resident of Temecula and Pechanga. Michaela Quilig was an original Pechanga allottee like Paulina Hunter. Paulina Hunter would stay with Michaela Quilig when she would visit Pechanga, an indication of the closeness of their relationship. This is to be expected for two women who were half-sisters.

My report presented significant evidence that Paulina Hunter's maternal grandmother, Restituta, was born at the original village of Temecula. Thus, Paulina Hunter descended from an original Temecula family. This information directly contradicts the statement asserted in Conclusion 4 of the Record of Decision that "Paulina Hunter is not of Temecula Descent."

Conclusion 5, which states, "Paulina Hunter was not an original Pechanga Temecula person," is incorrect. I have already pointed out that my report presented evidence that Paulina's father was the only Indian listed in the early San Luis Rey mission records who was actually born at Pechanga. Furthermore, the reasoning presented in Conclusion 5 is entirely based

upon a misinterpretation of the evidence. John Miller, Paulina Hunter's grandson, stated on his enrollment application (authorized by the 1928 California Indian Jurisdictional Act) that his "Grandmother and Great Grandparents were San Luis Rey Mission Indians." The Record of Decision incorrectly concludes that "the correct tribal ancestry of Paulina Hunter was San Luis Rey" and therefore not Pechanga Temecula.

In fact, the label "San Luis Rey Mission Indians" was an equivalent term to the way "Luiseños" is used today. *All* Pechanga Temecula Indians were "San Luis Rey Mission Indians," because all tribe members today all have ancestors who were baptized at Mission San Luis Rey. As some on the Pechanga council well know, I have responded frequently to requests by current tribal members to reconstruct their family genealogies using the mission records. Thus, I am in a position to know that virtually everyone in the tribe today descends from "San Luis Rey Mission Indians." John Miller's statement on his enrollment application doesn't make him any different that anyone else who was a Pechanga Temecula tribe member at that time. Indeed, there are many enrollment applications for people who are ancestors of today's Pechanga tribe members that make virtually identical statements to that made by John Miller.

It is unfair to the descendants of Paulina Hunter to be disenrolled from the Temecula Band of Luiseño Mission Indians based upon these incorrect conclusions contained in the Record of Decision of March 16, 2006. There is no credible evidence that Paulina Hunter was not a member of the Pechanga Temecula tribe; in fact the preponderance of the genealogical evidence contained in surviving records

would indicate that she was a descendant of both Pechanga and Temecula ancestors.

Sincerely,

/s/John R. Johnson, Ph.D.
John R. Johnson, Ph.D.
Anthropology Department Head

Advancing Appreciation and Understanding of Natural Science ☐ Founded 1916

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No. 09-1137

Supreme Court, U.S.
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In The Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, *et al.*,

Petitioners,

v.

MARK A. MACARRO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Petition should be denied because it presents no issue worthy of this Court's attention. The Ninth Circuit held that federal courts lack habeas corpus jurisdiction under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, over an appeal from a tribal appellate body's decision affirming the disenrollment of individuals who fail to meet the tribe's longstanding constitutional enrollment criteria.[1] That decision made no new law. To the contrary, the Ninth Circuit merely adhered to 150 years of consistent legal precedent that tribes have authority to make their own internal membership decisions in tribal forums. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Red Bird v. United States (Cherokee Intermarriage Cases)*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

The Amended Opinion makes denial of certiorari even more appropriate. The Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding and emphasized that any non-tribal remedy for tribal membership disputes

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[1] Appendix A to the Petition ("Pet. App.") contains the lower court's initial opinion in this case On March 22, 2010, four days after the Petition was filed, the Ninth Circuit issued an "Order and Amended Opinion." The Order and Amended Opinion (hereinafter "Amended Opinion") is attached as Appendix A (hereinafter "Opp. App.") to this Opposition Brief. Any citations in this brief are to the Amended Opinion found in the Opposition Appendix, unless otherwise noted.

must be created by Congress and not the courts. The Amended Opinion reaffirmed that mere disenrollment (with a resulting lack of access to certain tribal facilities), but with no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of property, no personal restraint, no restriction on movement within the Reservation, and only a speculative threat of future exclusion do not constitute detention under § 1303. The Amended Opinion reaffirmed that if Petitioners are ever excluded from the Reservation, they would first need to exhaust tribal remedies under the Pechanga Band's Exclusion and Eviction Regulations prior to seeking habeas relief.

The petition fails to identify any meaningful conflict between the Amended Opinion and a decision of another United States court of appeals or a state court of last resort. *See* Sup. Ct. R. 10(a). It also fails to articulate any meaningful departure from accepted precedent. *See id.* For these reasons, the Temecula Band of Luiseno Mission Indians of the Pechanga Indian Reservation (hereinafter "Pechanga Band" or "Tribe") respectfully requests that the Court deny the petition.

STATEMENT OF THE CASE

A. Factual Background.

Petitioners want federal court review of a final, internal tribal membership decision after full due process and appellate review were provided in tribal

forums. Petitioners seek to use the habeas corpus provision of the Indian Civil Rights Act, 25 U.S.C. § 1303, to burden federal courts with an entirely new role as overseers of tribal enrollment disputes.

The Pechanga Band is a federally–recognized tribe. 72 Fed. Reg. 13648, 13649 (Mar. 7, 2007). Respondents Mark Macarro, Mark Calac, Marc Luker, Andrew Masiel, Sr., Russell Murphy and Kenneth Perez constitute the elected Tribal Council of the Pechanga Band. Respondent Darlene Azzerelli is the Tribal Secretary. Respondent Christine Luker was, at the time the suit was filed, Tribal Treasurer, and now remains a tribal member. Respondent Donna Barron was, at the time the suit was filed, a Tribal Council member, and now remains a tribal member.

The case's factual history is set forth in the Amended Opinion. Opp. App. at 4-9. In summary, the Pechanga Band's General Membership adopted the Pechanga Constitution in 1978 which includes the Tribe's membership criteria.[2] *See* Opp. App. at 4.

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[2] Petitioners' false assertion that the enrollment criteria were illegally changed (Pet. at 16) is without support anywhere in the record. The court below specifically noted that the subsection A criteria was the standard applied in this case. Opp App. at 6. Petitioners for the first time in the Petition assert that they qualify for enrollment under subsection B (Pet. at 24 n.16), a claim they have not raised previously and one which the Committee put them on notice was available to them. ER Tab 24, Vol. III, at 145 (Summons: "you should provide the Committee with all information that you believe shows you meet the Pechanga Band's eligibility requirements").

The General Membership adopted the Pechanga Enrollment Disenrollment Procedures ("Disenrollment Procedures")[3] in 1988 to provide due process and a procedure to correct mistakes that resulted when membership was mistakenly approved. Opp. App. at 5.

In late 2002 and early 2003, the Tribe's Enrollment Committee[4] received allegations that tribal members from five separate lines of descent failed to meet the Pechanga Constitution's membership qualifications.

The Tribal Council, exercising its responsibility under the Constitution and Bylaws "to uphold the individual rights of each member without malice or prejudice," ER Tab 11, Vol. II, at 077, directed the Committee to (1) use a fair and impartial decision process by a majority of the Committee to review the files, (2) follow Robert's Rules of Order, and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures. *See* Opp.

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[3] The due process provided under the Disenrollment Procedures that were followed leading up to the decision to disenroll Petitioners and the tribal appellate process are identical to those in *Salinas v. LaMere*, where this court denied certiorari. *See* 547 U.S. 1147 (2006).

[4] The members of the Enrollment Committee were appointed by the Tribe's General Membership. ER Vol. II, Tab 25, at 149. As adult members of the Tribe at the time of the appointment, Petitioners were part of the General Membership. Consequently, the Petition's false statement that the Committee was "appointed by abusive tribal officials," Pet. at 3, 8, would, if true, apply equally to Petitioners.

App. at 7. After reviewing the facts concerning the first three lines of descent, the Enrollment Committee found that the affected tribal members did in fact meet the Pechanga Band's membership criteria. Review of the fourth line of descent resulted in a decision, affirmed on appeal, that members of that line did not meet the Pechanga Constitution's membership criteria. This Court denied a writ of certiorari from a state court appeal of that decision in *Salinas v. LaMere*, 547 U.S. 1147.[5]

The Enrollment Committee then reviewed allegations against Petitioners. After months of review, on May 3, 2005, the Enrollment Committee issued summonses to Petitioners stating the Committee believed grounds existed to initiate disenrollment procedures. *See* Opp. App. at 7-8. Pursuant to the Disenrollment Procedures, the Committee held Initial Meetings with Petitioners at which the Enrollment Committee

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[5] The lower court's decision is consistent with the decision of the California Court of Appeal in *Salinas v. LaMere*, 131 Cal.App.4th 1059 (Ct App. 4th Dist. 2005), that state courts lack jurisdiction in the same context. *Salinas* involved the same tribal constitutional membership criteria, the same procedural history, and the same tribal appellate process as this case. This Court declined to review *Salinas v. LaMere*, 547 U.S. 1147 (2006), just as it did *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996), a case involving habeas corpus jurisdiction under the ICRA of the disenrollment and banishment of tribal members and which was relied on by the lower court. The Petition provides even less compelling reasons than were unpersuasively asserted in *Salinas* and *Poodry*.

provided all available documentation supporting the allegations and explained why the documentation raised questions regarding the Petitioners' constitutional membership qualifications. *See* Opp. App. at 8.

On March 6, 2006, the Enrollment Committee issued a 28-page Record of Decision, *see* ER Tab 29, Vol. III, at 398, that addressed all the available factual information from Tribal enrollment records, submissions by Petitioners, and a genealogical study prepared by Dr. Johnson.[6] The Record of Decision disenrolled Petitioners for failure to prove lineal descent from an original Pechanga Temecula person as required by the Pechanga Constitution. Opp. App. at 8.

Petitioners exercised their right of appeal to the Tribal Council which affirmed the Enrollment Committee's decision. Opp. App. at 8-9. The Tribal Council found that: (1) there was no evidence of unfair or partial treatment of the Petitioners by the Enrollment Committee; (2) there was no evidence of negligence in the handling of the Petitioners' case by the

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[6] The Petition falsely claims that the Tribe fired Dr. Johnson who had been hired to research historical records for the Enrollment Committee. The quote in the Petition attributed to Dr. Johnson's report is found nowhere in the report. His report states in pertinent part that "the identity of Paulina Hunter's father can be narrowed down to four men . . . Paulina's mother's identity is less certain" and her ancestors may have been from two communities only one of which was relevant to the constitutional enrollment criteria. ER Tab 27, Vol. III, at 243-244.

Enrollment Committee; and (3) there was insufficient proof that the Enrollment Committee violated the Disenrollment Procedures. Opp. App. at 8-9.

B. District Court Proceedings.

Petitioners filed a writ of habeas corpus in the District Court on May 22, 2007, alleging jurisdiction based on the ICRA habeas corpus provision, 25 U.S.C. § 1303. Respondents moved to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and Petitioners opposed. *See* Pet. App. at 31a.

The district court granted the Tribe's motion, acknowledging that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Pet. App. at 36a (citing *Santa Clara Pueblo*, 436 U.S. at 72); *see also Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). The right to determine its own membership includes "the power to revoke that membership." Pet. App. at 37a; *Roff*, 168 U.S. at 222.

The district court found Petitioners' assertion that they had been "detained" within the meaning of 25 U.S.C. § 1303 was "not supported by the law or the facts." Pet. App. at 39a. The district court found that two of the Petitioners admitted in declarations that "they still reside on the Reservation, and none of the declarations contain allegations that Petitioners have

been denied access to the Reservation or otherwise physically detained." Pet. App. at 40a. The district court held that loss of privileges and mere speculation about some hypothetical future denial of access to the Reservation do not support habeas jurisdiction. Pet. App. at 41a. Quoting this Court's discussion of the ICRA habeas review of civil proceedings in *Santa Clara Pueblo*, the district court held that § 1303 does not apply to civil proceedings. Pet. App. at 38a.

The district court granted Respondents' motion to dismiss and Petitioners appealed to the Ninth Circuit.

C. United States Court of Appeals For The Ninth Circuit Decision

The Ninth Circuit issued its original opinion on December 22, 2009. Pet. App. at 1a. That first opinion affirmed based on three factors: (1) Petitioners were not detained, (2) Petitioners did not exhaust their tribal remedies, and (3) Petitioners' disenrollment was the result of a civil proceeding not subject to review under § 1303. Pet. App. at 19a.

On March 22, 2010, the Court of Appeals issued an Order and Amended Opinion. Opp. App. at 1. The Amended Opinion reaffirmed the district court's holding of lack of jurisdiction because of no detention and failure to exhaust tribal remedies.

Relying on *Santa Clara Pueblo* and the *Cherokee Intermarriage Cases*, the Amended Opinion recognized two baseline principles. First, "[o]rdinarily, federal courts lack jurisdiction to consider an appeal from a decision of an Indian Tribe to disenroll one of its members." Opp. App. at 9. Second, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Opp. App. at 9 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32, and *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). The Court of Appeals then turned to Petitioners' unprecedential attempt to use habeas corpus to collaterally attack their disenrollment. Opp. App. at 9-10.

The Court of Appeals correctly held that federal jurisdiction under § 1303 requires a detention. Opp. App. at 10. The court found no banishment, no arrest, no imprisonment, no fine, no eviction, no destruction of their property, no personal restraint, no restriction on movement within the Reservation, and only limited denial of access to certain facilities.[7] Opp. App. at 12-13. The court rejected Petitioners' efforts to equate disenrollment with denaturalization, finding Petitioners "have not been left stateless, and

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[7] The Petition alleges wrongly that Lawrence Madariaga "can no longer use the Health Clinic." Pet. at 5. Mr. Madariaga's declaration in the court below states. "I have limited use of the clinic." ER Tab 12, Vol. II, at 088.

nothing in the record indicates that the disenrollment proceedings were undertaken to punish [Petitioners]." Opp. App. at 17. The lower court could "find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303." Opp. App. at 15.

The court also rejected Petitioners' assertion that disenrollment with potential banishment is equal to detention under § 1303. Speculative future exclusion or eviction under tribal law is not detention for which habeas relief is available. Opp. App. at 14. If the Tribe were ever to banish Petitioners, they would have tribal remedies available and would need to exhaust those before attempting to seek habeas corpus review. Opp. App. at 18 *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16 n.8 (1987).

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. The Petitioner's main contention is that ICRA's habeas corpus provision applies to civil as well as criminal proceedings. Pet. at i, 8-16. While the Pechanga Band agrees with the Court of Appeals' original opinion on this issue (Pet. App. at 16a-19a), the Amended Opinion removed all analysis of the civil-versus-criminal nature of the tribal proceeding. Therefore, Petitioners' primary rationale for certiorari is moot.

2. The Petition does not allege there is a split on any issue raised in the Amended Opinion. Detention under the ICRA is interpreted consistently with the same requirement in non-tribal habeas corpus law. Opp. App. at 10. The Amended Opinion is consistent with the Second Circuit's decision in *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708 (2d Cir. 1998), holding that loss of a "voice" in the tribal community, loss of health insurance, loss of access to certain facilities, and loss of place on the membership roll do not constitute detention for purposes of habeas jurisdiction under the ICRA. It is also consistent with *Poodry*, 85 F.3d at 876, 878, holding that conviction for treason, permanent banishment, and permanent loss of all tribal rights represented a significant enough intrusion on liberty to constitute detention sufficient for habeas review under the ICRA. *See* Opp. App. at 12. The lower court's decision also is consistent with the decision of the Court of Appeal for the State of California in *Salinas*, 131 Cal.App.4th 1059, which held that state courts do not have jurisdiction under similar facts. *Salinas* involved the same constitutional membership criteria, the same procedural process, and the same tribal appellate process as existed in this case.

3. The Amended Opinion did not decide an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, the Amended Opinion rests on two well-settled principles long affirmed by this Court. First, "[a] tribe's right to

define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Opp. App. at 9; *see Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Second, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." Opp. App. at 10; *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Consistent with *Santa Clara Pueblo*, 436 U.S. at 60, the amended opinion recognized that "while Congress may have authority in these matters, in the complete absence of precedent, we cannot involve the courts in these disputes." Opp. App. at 16. Since passing the ICRA, Congress has limited, not expanded, habeas review. *See, e.g.*, 28 U.S.C. §§ 2254, 2255 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, § 104, 112 Stat. 1214 (1996).

4. The Petition at most seeks review based on the contention that the court below misapplied a properly stated rule of law. This is not a persuasive basis for granting *certiorari*. Sup. Ct. R. 10. The Petition concedes that the court below used the proper test for detention articulated in *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). Pet. at 17; Opp. App. at 14. Petitioners simply disagree with the lower court's application of the law to the facts. Under the standard in *Hensley*, denial of access to a senior center and a health clinic, and potential banishment

in the future are simply not a severe restraint on individual liberty warranting the extraordinary remedy of habeas corpus. Opp. App. at 15.

Similarly, the Petition urges the court to review the lower court's application of *Trop v. Dulles*, 356 U.S. 86 (1958), not because the lower court used the wrong standard, but simply because Petitioners would prefer a different result. The court below correctly found *Trop* to be inapposite to this case. "Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants." Opp. App. at 17.

The Pechanga Band, like the court below, recognizes that tribal enrollment determinations have significant consequences, both for the effected individuals and for the Tribe. That is why the Tribe has an independent Enrollment Committee and codified tribal laws governing enrollment issues. The Pechanga Band's Disenrollment Procedures, as accurately outlined in the Amended Opinion, afford due process consistent with the requirements of the ICRA, 25 U.S.C. § 1302(8). The ICRA's habeas provision does not provide unhappy tribal litigants with a means to defeat primary tribal jurisdiction over internal enrollment determinations where, as here, no detention exists. "The courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Felix S. Cohen, *Handbook of Federal Indian Law*, at 20 (1982 ed.).

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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DATED: April 20, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUISE VICTORIA JEFFREDO, JOYCE JEAN JEFFREDO-RYDER, CHRISTOPHER L. RYDER, JEREMIAH S. RYDER, JONATHAN B. RYDER, MICHAEL JOHN JEFFREDO, ELIZABETH VILLINA JEFFREDO, JACKIE M. MADARIAGA, KELLY M. MADARIAGA, CARRIE MADARIAGA, LAWRENCE MADARIAGA, WILLIAM A. HARRIS, STERLING HARRIS, APRIL HARRIS, MINDY PHENEGER, RICHARD HARRIS;

Petitioners-Appellants,

v.

MARK A. MACARRO, DONNA BARRON, MARC CALAC, MARK LUKER, ANDREW MASIEL, RUSSELL BUTCH MURPHY, KENNETH PEREZ, DARLENE AZZARELLI, CHRISTINE LUKER;

Respondents-Appellees.

No. 08-55037

D.C. No. CV-07-01851-JFW

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
April 17, 2009 – Pasadena, California

Filed December 22, 2009
Amended Opinion Filed March 22, 2010

Before: Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges, and Claudia Wilken,* District Judge.

Opinion by Judge N.R. Smith;
Dissent by Judge Wilken

COUNSEL

Paul Harris and Patrick Romero Guillory, Dolores Park Law Offices, San Francisco, California, for the petitioners-appellants.

Frank Lawrence, Holland and Knight, Los Angeles, California, and John Schumacher, Law Office of John Schumacher, LLC, Riverton, Wyoming, for the respondents-appellees.

ORDER

The opinion and dissent filed on December 22, 2009, and reported at 590 F.3d 751 are hereby amended. An amended opinion and dissent are filed concurrently with this order.

No petition for rehearing or rehearing en banc was filed within the original time period, and that

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

time period has now expired. No subsequent petitions for rehearing or rehearing en banc shall be filed.

IT IS SO ORDERED.

OPINION

N.R. SMITH, Circuit Judge:

The Pechanga Band of the Luiseño Mission Indians ("Pechanga Tribe") disenrolled a number of its members ("Appellants") for failing to prove their lineal descent as members of the Tribe. Federal courts generally lack jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Appellants, therefore, brought this petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act ("ICRA"), claiming their disenrollment by members of the Pechanga Tribal Council ("Appellees") was tantamount to an unlawful detention. Despite the novelty of this approach and despite the potential injustice of this situation, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained. Therefore, Appellants cannot bring their claims under § 1303 of the ICRA and we must affirm the district court. Only Congress can aid these appellants.

I. BACKGROUND

The Pechanga Tribe is a federally-recognized Indian tribe. 72 Fed. Reg. 13648, 13650 (Mar. 22, 2007). The Tribe's ultimate governing authority consists of all of the adult members of the Tribe ("General Membership"). On December 10, 1978, the Pechanga Tribe adopted the Constitution and Bylaws of the Temecula Tribe of Luiseño Mission Indians ("Pechanga Constitution"). Article II of the Pechanga Constitution provides:

> Membership is an enrolled member documented in the Band's Official Enrollment Book of 1979.
>
> Qualifications for membership of the Temecula Band of Luiseno Mission Indians Are:
>
> A. Applicant must show proof of Lineal Descent from original Pechanga Temecula people.
>
> B. Adopted people, family or Band, and non-indians cannot be enrolled. *Exception*: People who were accepted in the Indian Way prior to 1928 will be accepted.
>
> C. If you have ever been enrolled or recognized in any other reservation you cannot enroll in Pechanga.

At issue here is subsection A, requiring applicants to "show proof of Lineal Descent from original Pechanga Temecula people." In late 2002 and early 2003, the Enrollment Committee received information from its members alleging that a number of

Pechanga Tribe members were not lineal descendants from the original Pechanga Temecula people. Therefore, according to the Pechanga Enrollment Disenrollment Procedure ("Disenrollment Procedures"), the Enrollment Committee was required to investigate the allegations. Allegations surrounded five lines of descent that allegedly did not qualify for membership under the Pechanga Constitution.

According to the Pechanga Disenrollment Procedure, disenrollment is "revoking a person's membership when it is found that they do not meet the requirements set forth on the enrollment application which was approved by the Band." The Disenrollment Procedures were adopted by the Pechanga Tribe (1) to correct mistakes that resulted when tribal membership was mistakenly approved and (2) to provide a process that would allow a fair hearing in the disenrollment procedure. Under the Disenrollment Procedures, the Enrollment Committee initiates a disenrollment process against those individuals allegedly not qualifying for membership in the Tribe. After the initiation of the disenrollment, the Enrollment Committee must provide adequate notice to the individual to be summoned to a meeting with the Enrollment Committee. The notice must (1) state that the Enrollment Committee has questions regarding enrollment; (2) stress the importance of responding to the notice; and (3) request a meeting within thirty days of the response. Unless the person receiving the notice chooses to be automatically disenrolled, he or she must respond. Once a response has been filed, the

Enrollment Committee has thirty days to set up a meeting. At that meeting, the Enrollment Committee must show specific evidence that would prove that the documentation provided for enrollment does not provide evidence of lineal descent. If the Enrollment Committee provides such evidence, the individual then is allowed another thirty days to provide additional information to prove her or his lineal descent. If the individual provides further evidence that satisfies the Enrollment Committee as to his lineal descent, the process is terminated and the individual keeps his or her membership status. If the Enrollment Committee is not satisfied by the further evidence, the individual will be disenrolled and the Tribal Council is notified of the disenrollment.

If the Enrollment Committee fails to follow these steps or is negligent in any way, the individual can appeal to the Tribal Council for a fair hearing. At the hearing, the Tribal Council only reviews the documentation that the Enrollment Committee reviewed. The individual is not entitled to legal representation at the hearing. If the Tribal Council finds there was an error, the Enrollment Committee reevaluates the case. If the appeal is successful, membership will be reinstated.

Disenrollment does not mean that a person is banished from the Pechanga Reservation. The Pechanga Tribe instead has specific procedures for exclusion and eviction. These requirements are set forth in the "Exclusion and Eviction Regulations." Under these regulations, the Pechanga Tribe may

exclude and or evict someone from the reservation for: "(1) [v]iolating tribal laws and ordinances; (2) [c]reating conditions which pose a threat to the public health, safety and welfare; (3) [e]ngaging in criminal activities on the Pechanga Reservation, by finding of the Tribal Council, or being convicted of one or more felony crimes; (4) [b]eing declared a public nuisance by the Tribal Council; [or] (5) [c]reating a breach of peace, including but not limited to public drunkenness." The Exclusion and Eviction Regulations dictate the procedure to evict and or exclude and the opportunity to appeal such exclusion.

In early 2003, the Enrollment Committee began addressing the allegations regarding the lineal descent of certain members. On March 7, 2003, the Tribal Council issued a Notice and Order regarding pending disenrollment matters. The Notice and Order mandated that the Enrollment Committee: (1) "use a fair and impartial decision by a majority of the committee to review a file;" (2) follow Robert's Rules of Order; and (3) allow adequate time for presentation of evidence as required under the Disenrollment Procedures.

Sometime before March 7, 2003, the Enrollment Committee determined that the first three lines of descent met the membership criteria. Then it turned its attention to those members who claimed a lineal descent through Paulina Hunter. On May 3, 2005, after a proper vote, the Enrollment Committee summoned Appellants and notified them that the Enrollment Committee believed there were grounds to

initiate the disenrollment process. The summonses (1) notified Appellants that the disenrollment procedures had been initiated, (2) requested additional information concerning Appellants' family history, and (3) notified Appellants that they were required to set up an Initial Meeting with the Enrollment Committee.

Meetings were held with Appellants in June of 2005. The Enrollment Committee provided Appellants with a copy of all factual records in its possession. The Enrollment Committee then stated its concerns about each Appellant's claim of lineal descent. Appellants were also notified that they had thirty days to submit information supporting their claim of lineal descent. The Enrollment Committee emphasized that Appellants' enrollment would be measured by the Pechanga Constitution's requirements. The Enrollment Committee advised each Appellant that no decision would be made until it received all additional information.

On March 16, 2006, the Enrollment Committee (after review of the full record) disenrolled Appellants for failure to prove lineal descent from an original Pechanga Temecula person. Appellants exercised their right to appeal to the Tribal Council. The Tribal Council held hearings on July 21, 2006. The Tribal Council affirmed the Enrollment Committee, "finding: (1) there was no evidence of unfair or partial treatment of Appellants by the Enrollment Committee; (2) there was no evidence of negligence in the handling of Appellants' case by the Enrollment Committee;

and (3) there was insufficient proof that the Enrollment Committee violated the disenrollment procedures."

Appellants then filed a petition for writ of habeas corpus in the Central District of California. Appellants moved for summary judgment. Appellees filed a Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, claiming that the district court lacked subject matter jurisdiction. The district court granted the Motion to Dismiss. Appellants appealed the district court decision.

II. DISCUSSION

We review *de novo* dismissals for lack of subject matter jurisdiction under Rule 12(b)(1). *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004). We also review *de novo* a district court's denial of a petition for writ of habeas corpus under the ICRA. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998).

Ordinarily, federal courts lack jurisdiction to consider an appeal from the decision of an Indian Tribe to disenroll one of its members. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). Because of this precedent, Appellants did not directly appeal the Tribe's decision. Instead, they petitioned the court for a writ of habeas

corpus under the ICRA to collaterally challenge their disenrollment.

Section 1303 of the ICRA provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The term "detention" in the statute must be interpreted similarly to the "in custody" requirement in other habeas contexts. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) ("There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other habeas statutes." (citation omitted)). Further, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Therefore, an ICRA habeas petition is only proper when the petitioner is in custody. *Id.* at 791 (explaining the custody requirement).

We have also held that a litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus. *Selam*, 134 F.3d at 953-54 (explaining the exhaustion requirement); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* § 9.09 (2005). Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to "stay its hand" until the party has exhausted all available tribal remedies.

Cohen, *Handbook of Federal Indian Law* § 7.04 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)). "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam*, 134 F.3d at 953. There is authority for relaxing the exhaustion requirement where the party can show that exhaustion would be futile or that tribal courts offer no adequate remedy. *See id.* at 954.

Therefore, "all federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the IRCA [sic]: [(1)] The petitioner must be in custody, and [(2)] the petitioner must first exhaust tribal remedies."). Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n.280. We therefore have no jurisdiction to hear a petitioner's claim for habeas corpus, unless both of these conditions are met. Any expansion of this jurisdiction must come from Congress, not by decision of this court.

I. Appellants do not meet the requirements for the court to have jurisdiction under § 1303 of the ICRA.

A. Appellants were not detained/in custody.

Appellants contend that (1) the actual restraints, (2) the potential restraints, and (3) their lost Pechanga

identity all amount to detention under § 1303. We do not agree.

1.

Appellants contend that, because they have been denied access to the Senior Citizens' Center, cannot go to the health clinic, and their children can no longer go to tribal school, they have been detained. We disagree. *Jones v. Cunningham* requires that "conditions and restrictions . . . significantly restrain [one's] liberty" in order to invoke § 1303 jurisdiction. 371 U.S. 236, 243 (1963). The Second Circuit has said that "under *Jones* and its progeny, a severe actual or potential restraint on liberty" is necessary for jurisdiction under § 1303. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996); *see also Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003) (quoting *Poodry* for the same proposition). We agree with our colleagues on the Second Circuit and hold that § 1303 does require "a severe actual or potential restraint on liberty." *Poodry*, 85 F.3d at 880.

In the case before us, the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than

access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation. Faced with a similar situation, the Second Circuit also determined that less severe restraints such as loss of one's "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one's place on the membership roles of the tribe are simply "insufficient to bring plaintiffs within [the] ICRA's habeas provision." *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998).

Appellants contend that the denial of access to these facilities is similar to the restraint found in *Poodry*. This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. *See Poodry*, 85 F.3d at 876, 878. Appellants have not been convicted, sentenced, or permanently banished. We therefore hold that the limitation of Appellants' access to certain tribal facilities does not amount to a "detention."

2.

Appellants contend that, as non-members of the tribe, they are "under a continuing threat of banishment/exclusion." No court has held that such a threat

is sufficient to satisfy the detention requirement of § 1303.

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Hensley v. Mun. Court, 411 U.S. 345, 351 (1973). Applying this principle, we previously held that a threat of confinement is not severe nor immediate enough to justify the writ. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40-41 (9th Cir. 1975) (denying habeas relief under 28 U.S.C. §§ 2241, 2254). In *Edmunds*, the petitioner was subject to a court-imposed fine, which could be enforced by jail time. *Id.* at 41. The court held, however, that until confinement is imminent (like the confinement in *Hensley*) there can be no justification for use of the habeas corpus remedy. *Id.* We see no reason not to analogize to the court's construction of the criminal habeas corpus provisions in *Edmunds*. Therefore, we hold that the potential threat of future eviction is not sufficient to satisfy the detention requirement of § 1303.

Appellants argue that, while no such procedures have been commenced to exclude or evict Appellants,

there is a potential that they could be excluded. Under the Pechanga Non-Member Reservation Access and Rental Ordinance "[a]ccess to and residency within the Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band." However, the Pechanga Tribe enacted exclusion and eviction regulations that provide a process for eviction in an effort to protect law and order on the reservation and to provide uniform procedures for exclusion and eviction. These provisions apply equally to those who have been disenrolled and those who are current members of the tribe. Appellants admit they have never been subjected to exclusion or eviction proceedings.

3.

Appellants lastly contend that disenrollment, stripping them of their Pechanga citizenship, is enough of a significant restraint on their liberty to constitute a detention. While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303. While "Congress' authority over Indian matters is extraordinarily broad . . . the role of courts in adjusting relations between and among tribes and their members [is] correspondingly restrained." *Santa Clara Pueblo*, 436 U.S. at 71. Further, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 71 n.32 (citing *Roff v.*

Burney, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76). We have also noted that "[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). Thus (while Congress may have authority in these matters) in the complete absence of precedent, we cannot involve the courts in these disputes.

This court is without jurisdiction to review direct appeals of tribal decisions regarding disenrollment of members. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 72 n.32. We cannot circumvent our lack of jurisdiction over these matters by expanding the scope of the writ of habeas corpus to cover exactly the same subject matter. At its heart, this case is a challenge to disenrollment of certain members by the tribe. It is precisely because we lack jurisdiction to hear such claims, however, that Appellants brought this case under habeas corpus law. We find (and the parties direct us to) nothing in the legislative history of § 1303 that suggests the provision should be interpreted to cover disenrollment proceedings. Because nothing in the legislative history suggests otherwise and because binding precedent precludes review of disenrollment proceedings, we cannot accept Appellants' invitation to expand habeas corpus here.

Appellants contend that their disenrollment is analogous to denaturalization. We disagree. Appellants cite *Trop v. Dulles*, 356 U.S. 86 (1958), to support this proposition. The court in *Trop* was confronted with the constitutionality of a statute that

revoked United States citizenship for desertion during wartime even if the desertion was unrelated to any actions on behalf of a foreign government. *Id.* at 87-88. *Trop* is inapposite to this case. In *Trop* the statute left the defendant stateless. *Id.* Further, the statute was penal in nature. *Id.* at 96. Here Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants. Therefore, *Trop* is not controlling.

We do not wish to minimize the impact of the Tribe's membership decision on Appellants. Indeed, we recognize that Appellants have suffered a significant loss. Nevertheless, such loss is simply not equivalent to detention. This is not the first time that we have noted that we do not have jurisdiction to review membership decisions, even when the results of such decisions appear unfair. In *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), the plaintiff-appellants likewise sought judicial review of a tribal membership decision. We stated, "[a]lthough [plaintiffs'] claim to membership appears to be a strong one, as their father is a recognized member of the tribe, their claim cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Id.* at 960. In *Lewis* we further noted that our jurisdiction in these matters may prevent us from intervening even when fairness may seem to dictate otherwise. There we said, "[w]e agree with the district court's conclusion that this case is deeply troubling on the level of

fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of sovereign immunity. This is a matter in the hands of a higher authority than our court." *Id.* at 963.

B. Appellants have not exhausted their tribal remedies in order to challenge a claim of banishment from the reservation.

Appellants argue that disenrollment is similar to banishment and that they are therefore detained. However, Appellants have not been banished from the Reservation. The Pechanga Tribe has established uniform Exclusion and Eviction Regulations for excluding both members and nonmembers of the tribe from the Reservation. The Exclusion and Eviction Regulations also establish the procedures for appealing one's exclusion or eviction. Appellants have not been subjected to any exclusion or eviction proceedings. Therefore, they have not exhausted their claims for exclusion from the reservation or denial of access to it as established in the Exclusion and Eviction Regulations. We thus lack jurisdiction over any of Appellants' claims for exclusion or eviction.

III. CONCLUSION

The district court properly dismissed Appellants' action for lack of subject matter jurisdiction. Appellants were not detained and did not exhaust their tribal remedies. Therefore, they cannot get relief

under the habeas corpus provision of the ICRA. Accordingly, we affirm the district court.

AFFIRMED

WILKEN, District Judge, dissenting:

Appellants, enrolled members of the Pechanga Tribe since birth, filed a petition for a writ of habeas corpus under the Indian Civil Rights Act (ICRA) asserting that their Tribal Council violated the due process, equal protection, free speech and cruel and unusual punishment clauses of the Act when it stripped them of membership in the Tribe. The membership criteria that the Tribal Council applied were not established until 1979; the procedures it used to disenroll Tribal members were not established until 1988; and the Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe's casino profits became a major source of revenue.[1] Appellants allege that they are victims of the Tribal Council's greed associated with these casinos.

The majority concludes that the district court properly dismissed Appellants' petition for lack of subject matter jurisdiction because Appellants (1) were not detained and (2) did not exhaust their Tribal

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[1] At the time of Appellants' disenrollment, every adult Pechangan received a per capita benefit of over $250,000 per year.

remedies. I respectfully dissent and address each argument in turn.

I. Indian Civil Rights Act (ICRA)

Beginning in 1961, through hearings and surveys, Congress commenced an investigation into the conduct of tribal governments due to abuses that some tribal members were enduring at the hands of tribal officials. In 1968, Congress enacted ICRA to protect against such abuses by imposing restrictions upon tribal governments similar to those contained in the Bill of Rights and the Fourteenth Amendment. The enforcement mechanism Congress provided was that of habeas corpus in federal courts. The statute at issue, 25 U.S.C. § 1303, provides, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." A central purpose of ICRA was to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

A. Detention

"Detention" by order of an Indian tribe is the sole jurisdictional prerequisite for federal habeas review. The requirement in § 1303 that an individual be

"detained" is akin to the "in custody" and "detention" requirement in other habeas statutes. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 891 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996) ("Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context."). The habeas statutes analogous to § 1303 refer to "detention" as well as "in custody" throughout. *See* 28 U.S.C. §§ 2242, 2243, 2245, 2249, 2253 and 2255. "There is no reason to conclude that the requirement of 'detention' set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001). Nor is there any reason to conclude that the requirement of "detention" in § 1303 is any more strict than the requirement of "custody" or "detention" in the other federal habeas statutes.

The custody or detention requirement may be met if the habeas petitioner is not physically confined. *Jones v. Cunningham*, 371 U.S. 236, 239-40 (1963); *see Dow v. Court of the First Circuit Through Huddy*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted custody; requiring petitioner's physical presence at a particular place "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do"), *cert. denied*, 510 U.S. 1110 (1994).

The detention requirement is designed to limit the availability of habeas review "to cases of special

urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Therefore, the inquiry into whether a petitioner has satisfied the jurisdictional prerequisite for habeas review requires a court to judge the "severity" of an actual or potential restraint on liberty.

The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitute a severe restraint on their liberty. The majority analyzes each of these grounds separately, instead of collectively, and determines that none amounts to a detention. I respectfully disagree with this approach.

When Tribal members are disenrolled, they become "non-members" of the Tribe and lose all rights associated with being a Pechanga citizen. One of those rights is access to the Pechanga Reservation. The Pechanga Non-Member Reservation Access and Rental Ordinance (Reservation Access Ordinance) states, "The custom, tradition and practice of the Pechanga Band has always been, and remains, that the Pechanga Reservation is closed to non-members. Access to and residency within the Pechanga Reservation is a privilege which may be granted or denied to an individual upon proper authority of the Pechanga Band."

Elsewhere, the Reservation Access Ordinance provides, "Use by non-members of roads within the Pechanga Reservation is . . . by permission of the

Tribal Council and is subject to revocation at any time and for any reason." The Ordinance establishes that a non-member may enter the Pechanga Reservation only upon invitation by the Tribal Council or by an enrolled member of the Pechanga Band. Otherwise, access to the Pechanga Reservation by non-members is prohibited.

Since being disenrolled, Appellants have been excluded from the school, the health clinic and the senior citizens' facilities on the Reservation. Some of the Appellants live on the Reservation. Although they may enter the Reservation and travel to their homes, any Tribal Ranger can take away that liberty at any moment.

Pechanga Tribal Rangers have the authority and discretion summarily to exclude non-members from the Pechanga Reservation for up to seven days for any of the following reasons:

(1) suspicion that a non-member has committed a violation of any applicable tribal, state or federal law within the Pechanga Reservation;

(2) suspicion that a non-member is a danger to himself, herself or others;

(3) a finding by a Tribal Ranger that a non-member is a public nuisance; or

(4) any behavior which is suspicious or not consistent with a legitimate visit either to a tribal enterprise for business or patronage purposes, or to the home of a

> resident of the Pechanga Indian Reservation by invitation and in compliance with the Non-Member Reservation Access and Rental Ordinance.

Thus, a parent could, without warning, be barred from going home for a week by a Tribal Ranger who observes "any behavior that is suspicious." That Appellants have not been removed thus far does not render them free or unrestrained. Appellants may currently be able to "come and go" as they please, *cf. Hensley*, 411 U.S. at 351, but their current status as non-members living on the Pechanga Reservation means that at any point they may be compelled to "go," and be no longer welcome to "come." That is a severe restraint to which the members of the Pechanga Band are not generally subject. *See id.*

The majority analogizes the severe restraint Appellants confront with that in a case involving a twenty-five dollar fine. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975). In that case, the court held that Edmunds was not subjected to a severe restraint because there was "no provision in the sentence for his confinement in the case of nonpayment." *Id.* The court generally observed that "a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders." However, in the circumstances of *Edmunds*, "confinement [was] no more than a speculative possibility – 'the unfolding of events may render the entire controversy academic.'" *Id.* (quoting *Hensley*, 411 U.S. at 352).

Analogizing the current and potential penalties involved in this case with a twenty-five dollar fine and the speculative possibility that failure to pay the fine may result in judicial proceedings leading to confinement trivializes the severity of Appellants' situation.

Furthermore, Appellants have been stripped of their life-long Pechanga citizenship, which by itself constitutes a severe deprivation. A deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes." *Klapprott v. United States*, 335 U.S. 601, 611-12 (1949). The Supreme Court has found the penalty of denationalization of a natural-born citizen, sought to be imposed after conviction for military desertion, to be unconstitutional. *See Trop v. Dulles*, 356 U.S. 86, 104 (1958).

> It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.
>
> . . . .
>
> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be

> terminated. He may be subject to banishment, a fate universally decried by civilized people. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. at 101-102. A "deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." *Poodry*, 85 F.3d at 897. Although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans [sic]. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association. William C. Canby, Jr., *American Indian Law in a Nut Shell* §§ III.B-C (5th ed. 2009); Felix S. Cohen, *Handbook of Federal Indian Law* § 3.03 (2005). Such a loss constitutes a restraint on liberty that, combined with the actual and potential restraints described above, satisfies the detention requirement under § 1303, in my opinion.

The majority, in dicta, implies that we may not hear Appellants' ICRA claims because we generally do not have jurisdiction to review tribal membership decisions. Here, Appellants are not directly challenging the merits of their disenrollment, i.e. whether they are direct descendants from the original Pechanga Temecula people. Rather, Appellants challenge

under ICRA the manner of their disenrollment. The former would be barred by tribal sovereign immunity, whereas the latter is not.

B. Exhaustion

The majority concludes that we lack jurisdiction over any claims for exclusion or eviction because Appellants have not exhausted their Tribal remedies for such claims or demonstrated that exhaustion would be futile. But Appellants are not asserting jurisdiction based on any exclusion or eviction from the Pechanga Reservation. Rather, Appellants' claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion. Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment. Further, there does not appear to be any remedy available to Appellants if they were to be given a seven-day exclusion without warning. Appellants have exhausted their claims and their habeas petition is ripe for adjudication.

II. Conclusion

When viewed together, the act of stripping Appellants' Tribal citizenship and the current and potential restrictions placed upon Appellants constitute a severe restraint on their liberty. Therefore, Appellants have been detained within the meaning of § 1303.

Accordingly, I would reverse and remand to the district court to hear their petition for a writ of habeas corpus on its merits.

Supreme Court, U.S.
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No. 09-1137

In The
Supreme Court of the United States

LOUISE VICTORIA JEFFREDO, ET AL.,
Petitioners,

v.

MARK A. MACARRO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

The subtext of this case is the eligibility criteria of the Pechanga Tribe. Eligibility is based on direct lineage and not on blood quantum. Direct lineage is therefore, not difficult to trace or to prove. The Pechanga Tribe hired respected anthropologist, Dr. John Johnson[1], to investigate Pechanga bloodlines. He concluded that the Hunter clan was an original Pechanga family. The Tribe discarded his report and made "allegations" against Petitioners that they were not true Pechangans. In subsequent hearings, the Hunter clan presented over 150 pieces of evidence to prove lineal descent to an original Pechanga member[2]. That member is Paulina Hunter, an original Pechanga member in 1882 when the Reservation was created and one who received an original Federal Government allotment, #80, on the Reservation[3].

INTRODUCTION

The U.S. Supreme Court in *Hensley v. Municipal Court*, 411 U.S. 345, 349 (1973), reaffirmed that the purpose of habeas corpus was to rectify injustice:

> "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

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[1] Anthropology Dept. Head, Santa Barbara Museum of Natural History

[2] Louise Jeffredo Decl., ER Tab 8, Vol. II, at 059(7).

[3] Never denied by the Tribe.

> [citations omitted] Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

In the instant case, Appellants suffered an irreparable harm. Congress has provided due process guarantees and a specific remedy, habeas corpus, to redress such injustice by passing the Indian Civil Rights Act (ICRA) 25 U.S.C. §1301-1303. If this Court allows this restrictive interpretation of habeas relief asserted by the Court of Appeal and District Court to stand, every Native American who is stripped of their tribal citizenship without due process will be shutout from judicial review.

This blocking of review by an impartial judiciary will continue to take place, even if the Native American is a teenager like Appellant Elizabeth Jeffredo, who was born a member of the tribe and whose parents, grandparents, and great-grandparents were members of the Tribe. Moreover, the doors will be locked shut even if the Native American is someone like 92 year-old Lawrence Madariaga, a disenrolled Petitioner who was officially honored by the Tribe for advancing the Reservation.

ARGUMENT

I. CHALLENGING THE MANNER IN WHICH APPELLANTS WERE DISENROLLED IS NOT BARRED BY TRIBAL SOVEREIGNTY.

The majority frame *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Lewis v. Norton*, 424 F. 3d 959 (9th Cir. 2005) as precedent, saying that the courts have heard cases involving "membership decisions" and found no jurisdiction over such decisions.[4]

The dissent correctly notes this as a mischaracterization of the issue and clarifies that the true nature of Appellants' argument attacks the procedural violations committed by Respondents. The dissent states:

> The majority, in dicta, implies that we may not hear Appellants' ICRA claims because we generally do not have jurisdiction to review tribal membership decisions. Here, Appellants are not directly challenging the merits of their disenrollment, i.e. whether they are direct descendants from the original Pechanga Temecula people. Rather, Appellants challenge under ICRA the ***manner*** of their disenrollment. ***The former would be barred by tribal sovereign immunity, whereas the***

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[4] *Santa Clara* is distinguishable on the facts and on the nature of the proceeding (not habeas corpus). See Pet , at 14-16.

Respondents confuse the matter by citing *Salinas v. La Mere*, 547 U.S. 1147 (2006), 131 Cal App. 4th 1059 (2005) But *La Mere* concerned Public Law 280; it didn't involve ICRA.

> ***latter is not***. (Opp., at App. 27) [Emphasis added].

Appellants' argument is *not* that the court has jurisdiction to put itself in place of the Enrollment Committee or make membership decisions for the Tribe. Rather, Appellants challenge Respondents' violation of their procedural rights granted to all Native Americans by ICRA. Congress has granted federal courts the authority to hear applications for habeas by any person claiming to be detained in violation of the Constitution or laws or treaties of the United States. *Rasul v. Bush*, 542 U.S. 466 (2004). Appellants' liberty has been restrained as a result of proceedings riddled with procedural defects. Where a defect involving denial of a constitutional right invalidates the proceeding, habeas ordinarily lies.[5] In determining whether these defects invalidate the proceedings, courts have looked to the totality of circumstances, including an examination of the existing procedural safeguards, in relation to the penalty faced by the habeas petitioner. In this case, Petitioners were facing the stripping of their life-long tribal identity and citizenship, as well as stripping it from their descendants for all time. Virtually every procedural right under ICRA that should have been afforded to Petitioners, was blatantly violated during their disenrollment hearings.

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[5] *Mitchell v Youell*, 130 F.2d 880 (C.C.A. 4th Cir. 1942).

a. Petitioners' Due Process Rights Were Violated Resulting In A Severe Restraint On Their Liberty.

Section 1302(8) of ICRA guarantees that, "no Indian tribe in exercising powers of self-government, shall deny to any person within its jurisdiction the equal protection of its laws or **deprive any person of liberty** or property **without due process of law**." [Emphasis added]. Whether or not the proceeding used to disenroll Petitioners is considered "civil" or "criminal," Petitioners are still guaranteed due process rights. The right to confront unfavorable witnesses, the right to call witnesses in one's behalf and the right to view all submitted evidence are all part of the "fundamental fairness" which is at the heart of due process. All of these rights were denied to Petitioners when the Enrollment Committee relied on numerous statements, declarations, and documents unfavorable to Petitioners but did not allow them to see or cross-examine any of these persons. In some instances they were told that they would not be informed of the names of the persons who made "allegations against" them. They were also denied the right to view all adverse documents used by the Tribe to rule against them.[6]

The Tribe specifically prohibited Appellants from having an attorney at the hearings and further, they didn't receive advance notice of allegations against them, that is, why that they weren't qualified as Pechangans. Without knowing the allegations

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[6] See Jeffredo Decl., ER Tab 27, Vol. III, at 311, detailing many due process violations.

beforehand, Petitioners had no way of refuting them. It wasn't until they received the Tribe's *Record of Decision* that Petitioners discovered the alleged reason they were disenrolled.

Respondents ignored basic notions of due process in disenrolling Petitioners and caused severe restraints on their liberty. Petitioners are not asking this Court to modify notions of tribal sovereignty, but rather to recognize the already existing habeas provision in ICRA and enforce Petitioners' due process rights.

b. Lewis v. Norton Is Not Binding On This Case.

The majority relies on *Lewis v. Norton* (Opp., at App. 17) for the proposition that federal courts have no jurisdiction over "membership decisions," however such a holding is inapplicable factually and legally to the present case. The plaintiffs in *Lewis* were not seeking federal court jurisdiction under ICRA, nor were they disenrolled life-long members. They instead, urged the court to make them newly enrolled members of the tribe, seeking declaratory and injunctive relief. While the majority states that they do not wish to minimize the impact of the Tribe's membership decision on Appellants (Opp., at App. 17), they accomplish just this by comparing this case, which involves the involuntary taking of life-long Tribal citizenship, with a case concerning persons who were never members of a tribe in the first place.

II. THE LOWER COURT'S IMPROPER RESTRICTION OF HABEAS CORPUS IS NOT MOOT.

In its initial opinion, the court below contradicted years of established law by ruling that habeas corpus only applied to criminal proceedings. This is a crucial issue because most disenrollment hearings are accomplished in tribal civil proceedings; thus the ruling would foreclose future judicial review of any disenrollments throughout the country.

Because it was deleted, Respondents claimed that the issue of habeas' applicability to civil proceedings is now moot. Nonetheless, they continued to argue that ICRA's habeas provision does not apply to civil proceedings (Opp., at 10). In support of their argument they cite the District Court and the Court of Appeals' original opinion holding that habeas "does not apply to civil proceedings" (Opp., at 8 & 10).

Since the amended opinion below affirmed the district court (and both opinions remain published), the district court's rulings remain as good law. The Opposition's repeated claim that the district court's ruling means that habeas does *not* apply to tribal civil proceedings, ominously foreshadows how lawyers for abusive tribal officials would use *Jeffredo v. Macarro* to circumvent the protections of ICRA and lockout judicial review.

To restrict habeas solely to criminal proceedings has no basis in the Congressional history or in the

well-settled law of habeas corpus. (See Pet., at 8-14 for analysis).[7]

III. THE LOWER COURT MISAPPLIED A PROPERLY STATED RULE OF LAW BY USING THE WRONG LEGAL TEST FOR DETENTION.

Section 1303 of ICRA has one requirement for jurisdiction – a "detention." The Supreme Court has laid out the proper test to determine when a non-custodial detention can be the basis for habeas jurisdiction. See *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963), *Hensley v. Municipal Court, supra.* A court must look at the combined effects of the various conditions which restrain a person's freedom. The majority below incorrectly isolated each restraint and concluded that none of them is severe enough by itself to constitute a detention. In contrast, the dissent followed the correct legal test:

> "The combination of the current and potential restrictions placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty. The majority analyzes each of these grounds

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[7] The Opposition at 12 also argues that Congress has limited habeas review since the passage of ICRA. They only cite the Antiterrorism and Effective Death Penalty Act. Congress' limiting of habeas in that specific area of law is irrelevant to ICRA. Congress has not changed the habeas provision of ICRA since its initial passage in 1968. In the years following its passage, the courts have actually expanded the writ of habeas corpus. See e.g. *Hensley* and its progeny. Cf., *Bournedine v. Bush*, 553 U.S. 723 (2008).

> separately, instead of collectively, and determines that none amounts to a detention. I respectfully disagree with this approach" (Opp., at App. 22).

In *Jones v. Cunningham, supra*, at 242-43, the High Court analyzed the various "conditions which significantly confine and restrain his freedom." The Court has established that this inquiry is not narrow, but one of degree requiring an examination of the totality of restraints being imposed upon the Petitioner. This Court in *Jones* examined all of the restraints placed upon a parolee; from the physical geographical restraints, to the personal restraints involving even whom the Petitioner could socialize with. It is without question that some of these "conditions" when taken alone would not be enough to render the Petitioner "in custody" but rather, it is all of these restraints together that amount to a severe restraint upon Petitioner's liberty.

As stated in dissent below, "When viewed together, the act of stripping Appellants' Tribal citizenship and the current and potential restrictions placed upon Appellants constitute a severe restraint on their liberty. Therefore, Appellants have been detained within the meaning of § 1303." (Opp., at App. 27-28).

If one uses the proper combination of factors, therefore, the conclusion would coincide with the dissent's below; that habeas jurisdiction under ICRA exists in this case.

IV. THE LOWER COURT'S RULING IS INCONSISTENT WITH THE SUPREME COURT AND THE SECOND CIRCUIT.

Trop v. Dulles, 356 U.S. 86 (1958) held that stripping away of American citizenship is the most severe of penalties. Respondents claim that *Trop* is "inapposite" because "Appellants have not been left stateless," as stated below (Opp., App at 13). This ruling is in conflict with *Poodry v. Tonawanda Band of Seneca Indians*, 853 F.3d 874 (1996), which specifically rejected the "*have not been left stateless*" argument. It made clear that the loss of a person's tribal citizenship can only be viewed in terms of that person's cultural identity and not in relation to the fact that the "public at large" or "other Americans" do not share this identity. The court stated that, "...a deprivation of citizenship does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence. To measure whether summary banishment from a tribe constitutes a severe deprivation solely by reference to the liberties of other Americans is tantamount to suggesting that the petitioners cannot live among members of their nation simply because other Americans cannot do so; and that the coerced loss of an individual's social, cultural, and political affiliations is unimportant because other Americans do not share them. Such an approach renders the concept of liberty hollow indeed" *Poodry* at 897.

While here, Appellants have been disenrolled and not banished, this reasoning still applies because tribal citizenship is at issue. For centuries, Appellants and their ancestors have developed a social, political and

cultural identity as Pechangans. It is absurd to claim that Appellants' American citizenship, which came long after their ancestors were settled, makes the loss of their Indian citizenship less severe. Such reasoning is counter to the idea that, "there is something distinct and important about Indian nationhood and culture that the ICRA is designed to promote and sustain." *Poodry* at 897.

The dissent below also rebuts the "not stateless" ruling, "although with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans[sic]. This is more that just a loss of a label, it is a loss of a political, ethnic, racial and social association." (Opp., at App. 26.)

The second part of Respondents' argument relies on the majority's use of an incorrect legal test to deny jurisdiction. The majority rules that "nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants" (Opp., at App. 13). The correct legal test is to analyze the *consequences* of the tribal officials' action, not their intent. Without a habeas hearing we cannot know whether the Enrollment Committee's intent was to correct the rolls; or to consolidate the Tribal Council's political power by disenrolling 100 voting members; or even to secure an additional $25,000,000 annually, simply by excluding the Hunter clan. Whether or not they intended to punish -- the result was a punishment. As *Trop* makes crystal clear, the taking of national citizenship "is a form of punishment more primitive that torture, for it destroys for the individual the political existence that was centuries in the

development" *Trop*, at 98. A deprivation of citizenship is "an extraordinarily severe penalty" with consequences that "may be more grave than consequences that flow from conviction for crimes." *Klapprott v. United States*, 335 U.S. 601, 611-612 (1949).

Unlike the Opposition, the court in *Quair v. Sisco*, 359 F. Supp. 2d 948 (2004) employed the correct test in an ICRA case ruling that, "the disenrollment and the banishment of that tribal member constitutes a punitive sanction irregardless of the underlying circumstances leading to those decisions."

If a tribal court had imposed a sentence of permanent disenrollment in a criminal proceeding, it would be a clear reviewable violation of ICRA.[8] However, by simply not having a tribal court, the Pechanga Tribe has been authorized to mete-out a punishment which "is offensive to cardinal principles for which the Constitution stands" *Trop* at 101-02, and a punishment that a tribal court could not impose.

V. THE RULING BELOW CONFLICTS WITH ESTABLISHED LAW CONCERNING THE EXHAUSTION OF TRIBAL REMEDIES.

The Opposition chose not to address substantively, the "exhaustion of remedies" holding of the majority below. Failing to do so demonstrates just how illogical

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[8] §1302(7) No tribe may "require excessive bail, impose excessive fines, inflict cruel and unusual punishments... (or) impose any penalty ..greater than imprisonment for .one year and a fine of $5,000, or both "

and contrary to the fundamental law of *exhaustion of remedies*, that section is. The majority ruled that the Hunters failed to exhaust their tribal remedies because they did not appeal their exclusion from the reservation.

Appellants were not officially excluded, but the majority mistakenly states that Appellants equate their "disenrollment" with "exclusion." But their "claim of jurisdiction is based on the restraints on their liberty arising from being disenrolled and threatened with exclusion. Notably, the parties agree that Appellants have completed the internal Tribal appeal process for challenging disenrollment." (Opp., at App. 27).

It would be futile to try to appeal their exclusion because they haven't been officially excluded. It is well established that "futility" is an exception to the exhaustion of tribal remedies doctrine[9]. Requiring Appellants to appeal a non-existent exclusion would be futile, and permitting the holding below to stand would directly conflict with case law concerning the futility exception[10] and disregard the grueling appeals that the Tribe subjected Appellants.

CONCLUSION

Although the Pechanga Tribe is one of the richest tribes in America, it has no tribal court to review

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[9] 186 A.L.R Fed. 71 Construction and Application of Federal Tribal Exhaustion Doctrine.

[10] See *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (1975).

injustices. If this Court denies jurisdiction, then the entire Hunter family will have its citizenship stripped away forever and will be restricted from full access to their homeland. They will never have their day-in-court, in *any* jurisdiction. This is a violation of the spirit and letter of the law found in the Indian Civil Rights Act, 25 U.S.C. 1301, et seq.

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